

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA

For the Period
January 1, 1949
Through March 31, 1949
Volume No. 54

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from January 1, 1949, through March 31, 1949.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,
Attorney General.

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**QUARTERLY REPORT
OF THE
ATTORNEY GENERAL**

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OPINIONS

January 3, 1949.

Hon. H. L. Williams,
Mayor, Town of York,
Sumter County,
York, Alabama.

Municipalities—Town Council—Schools.

1. The governing body of the Town of York may, upon adoption of ordinance or resolution providing for same, legally furnish free of charge, or at a rate less than that charged other consumers, water for a public swimming pool located upon lands belonging to the County Board of Education and operated under the control and jurisdiction of the County Board of Education.

2. Physical education is a recognized and required part of the curricula of students of the schools of the State.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of December 7, 1948, is as follows:

"Can the Town of York legally furnish gratis, water for a swimming pool, to be built on State School property?"

"The cost of pool to be paid by public subscriptions and pool will be controlled by County Board of Education, or could the Town furnish water at a lower rate than our regular Meter Rates?"

"Will appreciate your consideration and reply."

I am of the opinion that the Town of York may legally furnish, free of charge, water for a public swimming pool located on State school property and operated under the control and jurisdiction of the County Board of Education, or that such town may either furnish water for such pool at a lower rate than furnished other consumers, such being a question addressing itself to the sound discretion of the governing body of the town.

It is provided by Title 37, Section 429(11), Code of Alabama 1940, relative to the powers and duties of the governing bodies of cities and towns that:

"11. Except as otherwise provided herein, they shall have the management and control of the finances and all of the property, real and personal, belonging to the city or town."

It is also true that by reason of Title 52, Section 148, Code of Alabama 1940, the general administration and supervision of the public schools of those municipalities having a population of less than 2500 persons at the date of the last Federal census is vested in the County Board of Education rather than a City Board of Education. The Town of York having a population of 1783 persons as of the date of the Federal census of 1940, the general administration and supervision of the public schools of such town is vested in the County Board of Education.

In the case of *Carey v. City of Haleyville*, 230 Ala. 401, 161 So. 496, the Supreme Court had occasion to consider the authority of the governing body of a town of the same population classification as that of the Town of York to expend public money in support of the public schools of the town even though title to such buildings and lands was vested in the County Board of Education rather than the Town. The Court therein observed:

"True, the municipality may not have title to the school building, and it may be under the control of the county board (Gen. Acts, Ex. Sess. 1933, p. 81, amending School Code 1927, § 132), and the affairs of the school be under like control. School Code 1927, § 86. But considerations of this character would deny to the municipal corporation the power to donate any funds to the betterment of the schools located therein, as its public schools, by reason of the population limitation of 2,500 are under the supervision of the county board. Yet the inhabitants of Haleyville receive the benefit and enjoy the privileges of these schools in their midst; and the mere fact that another and independent agency of the state controls their affairs is no reason for a denial of the right of the citizens through their municipal authorities lending aid in support of such institutions.

"The lawmakers, of course, presumably were aware of the restrictions imposed in section 2314 of the Code, and were likewise aware of the fact that in municipalities of less than 2,500 inhabitants the supervision and control of the public schools were with the county board.

"No sound reason appears why such municipalities may not devote surplus proceeds of revenue for the erection or maintenance of such schools located within their corporate limits. The inhabitants receive the benefits, though along with others in territory surrounding.' (Emphasis supplied)"

In my judgment, such reasoning is equally applicable to the situation you have outlined, and it is my opinion that the Town of York, acting by and through its municipal authorities and upon adoption of ordinance or resolution providing for same, may lawfully furnish free of charge, or at a less rate than that charged other consumers, water for a public swimming pool, even though such pool be located upon lands

belonging to the County Board of Education and such pool be operated under the control and jurisdiction of the County Board of Education.

I base such conclusion upon the further fact that physical education of students in the schools of Alabama is a recognized and required part of their curricula, such requirement being found within the provisions of Title 52, Section 555, Code of Alabama 1940, which statute provides that:

"Every public school and private or parochial school shall carry out a system of physical education, the character of which shall conform to the program or course outlined by the department of education."

It is, therefore, to be seen that the schools of this State not only may, but are required, to institute and foster a program of physical education for the students of such schools, and under the reasoning and authority found within the case of *Carey v. City of Haleyville*, supra, I am clear to the conclusion that the Town of York may, through its governing body, make appropriation of the money or property of such municipality in such manner as it deems advisable in the furtherance of such program of physical education within the public schools located within such municipality. Cf. Biennial Report of Attorney General, 1936-38, page 3; Biennial Report of Attorney General, 1936-38, page 261; Quarterly Report of Attorney General, Volume 51, page 124.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 4, 1949.

Hon. E. M. Friend, Chairman,
Committee of Unauthorized Practice of Law,
Sirote, Permutt & Friend,
520 First National Building,
Birmingham 3, Alabama.

Attorneys—Practice of Law. Title 46, Section 42, Code of Alabama 1940.

1. An individual not duly licensed to practice law who for a consideration prepares and files with the Board of Equalization letters of protest on behalf of the taxpayer to an ad valorem assessment is engaged in the illegal practice of law.

2. An individual not duly licensed to practice law who for a consideration appears before the Board of Equalization and presents the contentions of the taxpayer, either with or without

the taxpayer, and attempts to adjust ad valorem assessments is engaged in the illegal practice of law.

3. An individual not duly licensed to practice law who holds himself out to the public as being ready, able and willing for a consideration to represent taxpayers in securing favorable adjustments before the Board of Equalization is engaged in the illegal practice of law.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of April 23, 1948, is as follows:

"On behalf of the Birmingham Bar Association, we respectfully request that you render to us an opinion indicating if the activities of certain laymen as hereinafter described, constitute the unauthorized practice of the law.

"The Board of Equalization of Jefferson County was established by the 1939 General Act of the Legislature, and provides for a method of assessing real property located in Jefferson County. The pertinent provisions are contained in Title 51, Section 78 et seq. 1940 Code of Alabama.

"Where the Board of Equalization determines that an ad valorem assessment should be raised, it provides that the taxpayer may have an opportunity of requesting an oral hearing before the Board to determine the accuracy of the assessment. In order to secure such a hearing it is necessary that a protest be filed on behalf of the taxpayer, before certain specified dates. The form of this protest is similar to that which is attached hereto and marked Exhibit 1. This protest must contain the following information:

- "1. Legal description of the property.
- "2. Valuation fixed by the Board of Equalization.
- "3. Taxpayers estimated valuation of property.
- "4. Reasons why valuation placed on the property by the Board of Equalization is excessive.

"After this protest is filed the taxpayer receives a letter from the Board of Equalization, identical with the one which is attached hereto and marked Exhibit 2. Your attention is invited especially to the information on the reverse side of the letter which is required to be presented to the Board at the time of the hearing. The actual hearing before the Board is informal, but the taxpayer may present any evidence, including expert testimony, to substantiate his con-

tentions. At the conclusion of the hearing before the Board, the taxpayer either accepts the valuation placed on the property by the Board initially, or secures a compromised adjusted figure, or gets the Board to accept his own ideas of valuation, or appeals the case to the Circuit Court of Jefferson County for further action.

"Many laymen, especially realtors, have been representing taxpayers and assisting them in obtaining reductions in proceedings before the Board of Equalization where ad valorem assessments are protested. Compensation is paid to these laymen for their activities in this connection, many such payments being made upon a contingency basis depending upon the extent of the reduction which the layman is able to secure. In the main, the work of the laymen consists of the following:

- "1. Preparing and filing letters of protest on behalf of the taxpayer with the Board of Equalization, similar to those attached hereto and marked Exhibit 1.
- "2. Appearing before the Board of Equalization and presenting the contentions of the taxpayer, either with or without the taxpayer, and attempting to adjust ad valorem assessments.
- "3. In some instances, at least, holding themselves out to the public as being ready, able and willing, for a consideration, to represent taxpayers in securing favorable adjustments before the Board of Equalization.

"It is the opinion of the Committee on the Unauthorized Practice of the Law of the Birmingham Bar Association that each of the above described acts on the part of laymen constitute the unauthorized practice of the law. We arrive at this conclusion based primarily upon Title 46, Section 42, 1940 Code of Alabama; Berk v. Estate, 225 Alabama 324, 142 So. 832; and Wilkey vs. Estate, 224 Ala. 568, 140 So. (2d) 536. There are a multitude of authorities in other jurisdictions to similar effect, but we feel no useful purpose could be served by citing them.

"Based upon the above-described facts, we respectfully request that you furnish us with your opinion concerning the legality of the acts of the laymen as hereinabove indicated, specifying whether all or any portions of the activities of these laymen constitutes the illegal practice of the law."

Copies of Exhibits 1 and 2, referred to in your inquiry, are set out below.

"EXHIBIT 1.

"Board of Equalization of Jefferson County, Alabama
 108 Jefferson County Court House
 Birmingham 3, Alabama
 Gentlemen:

Now comes the undersigned taxpayer _____,
 Birmingham, Alabama, and protests and objects to the valuation fixed
 by the Board of Equalization on the real estate hereinafter described,
 belonging to and assessed for taxation by the undersigned taxpayer,
 and assigns as reason for such objection, the grounds hereinafter
 stated, separately and severally:

Unit No.	Description	Valuation fixed by Board of Equalization	Taxpayer's Estimated Valuation
----------	-------------	--	--------------------------------------

The taxpayer claims that 60% of the reasonable valuation of
 said real estate is the amount hereinabove stated by the taxpayer
 and that the valuation placed on said property by the Board of
 Equalization is excessive, discriminatory, and confiscatory and in
 violation of the law.

The taxpayer prays for a hearing on this protest."

BOARD OF EQUALIZATION
 JEFFERSON COUNTY
 602 Court House
 Birmingham, Alabama

"EXHIBIT 2.

"You have filed a protest to the assessed valuation on certain
 property or properties in Jefferson County.

"This is to notify you that your case has been set for hearing
 on _____ in Room 602 Court House, Birming-
 ham. The hours fixed by law for hearing protests are from 9 A.M.
 to 5 P.M.

"The law directs that if 'the valuation theretofore placed was
 not sixty per cent (60%) of the reasonable market value of such
 property, WHETHER MORE OR LESS, then the said valuation or
 assessment shall be corrected so that it will show SIXTY PER CENT
 of a fair and reasonable market value,' for the assessed value of
 such property.

"It is not necessary for you to employ anyone to handle your
 tax protest. The property owner will receive every consideration
 and courtesy that anyone representing him would receive.

"On the day set for hearing your protest, you must be prepared to give reasons why the property is not assessed at 60% of the fair and reasonable market value. Therefore, it is necessary that you bring with you all pertinent data and information outlined on the back of this letter.

"Yours very truly,

BOARD OF EQUALIZATION
of Jefferson County"

(OVER)

"TO THE TAXPAYERS OF JEFFERSON COUNTY WHO HAVE
FILED PROTESTS ON THEIR ASSESSMENTS FOR THE CURRENT
TAX YEAR

"Conforming with the tax laws under which we operate, the BOARD OF EQUALIZATION will begin hearing formal protests which taxpayers have filed as to their current assessments on June 1st. All such taxpayers are being notified by mail as to the date set to hear each particular protest.

"The law requires that consideration be given to all factors bearing on the value of properties and it is necessary that each taxpayer bring with him the following information about each piece of property involved:

- "1. Date of acquisition and purchase price, or total construction cost.
- "2. If there is a mortgage, the original amount, and the unpaid balance.
- "3. Data regarding sales of this property within the last few years.
- "4. The amount of fire and tornado insurance carried on the improvements.
- "5. Insurance carried on the contents of buildings.
- "6. Details of any formal appraisals which may have been made on the property in recent years.
- "7. If the property is rented, bring full data as to the terms of the lease, and the amount of rentals.
- "8. If income, business or industrial property, furnish book value of the improvements, and also amount shown in Federal Income Tax Return and amount of depreciation.

"All this information is essential for making any accurate appraisal of real estate regarding each of your parcels on which a protest has been filed.

"The law directs that you present such evidential support of your objections regarding each parcel of property protested.

BOARD OF EQUALIZATION"

It has been held by courts that it is difficult, if not impossible, to lay down an all inclusive definition of the practice of law.

A number of courts have, from time to time in deciding a given case, attempted to define practice of law but the general trend of judicial decisions is to determine each case of unauthorized practice of law largely upon its own particular facts. The decision in this opinion is based upon the particular facts set forth in your inquiry.

It is my opinion that all of the activities of the laymen as enumerated in your inquiry constitute the illegal practice of law.

Title 46, Section 42, Code of Alabama 1940, defines the practice of law as follows:

"Who may practice as attorneys.—Only such persons as are regularly licensed have authority to practice law. For the purposes of this article, the practice of law is defined as follows: Whoever, (a) in a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a justice of the peace, or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or, (b) for a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or, (c) for a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or, (d) as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law. Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands; nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon. Any

person, firm or corporation who is not a regularly licensed attorney who does an act defined in this article to be an act of practicing law, is guilty of a misdemeanor, and on conviction must be punished as provided by law. And any person, firm or corporation who conspires with, or aids and abets, another person, firm or corporation in the commission of such misdemeanor must, on conviction, be punished as provided by law."

This prescription or legislative definition of the words "practicing law" is specific, its own interpreter, and unambiguous. Without looking further, it appears to be unquestionable that the preparing and filing of protests with and the appearing before the Board of Equalization as specified in Paragraphs One and Two in your inquiry come squarely within the definition or definitions as set out in Section 42, *supra*, and as such constitute the illegal practice of law. (The act of holding themselves out to the public as set forth in Paragraph Three of your inquiry is treated separately below.)

However, there is ample authority in court decisions of the State of Alabama and of other jurisdictions which lead to the conclusion as stated above.

In the case of **Berk v. State**, 225 Ala. 324, 142 So. 832, 84 A. L. R. 740, in defining what constitutes the practice of law, the Court said:

"The practice of law is not limited to the conduct of cases in court. * * * In a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts, by which legal rights are secured, although such matter may or may not be depending in a court. * * * * *"

And further:

"The practice of law involves, not only appearance in court in connection with litigation, but also services rendered out of court. In litigated matters it involves not only the actual representation of the client in court, but also services rendered in advising a client as to his cause of action or defense. The practice of law also includes the giving of advice or rendering services requiring the use of legal skill or knowledge. *People v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N. E. 901, 907. In the case just cited, the following definition of practicing law was approved: 'Practicing as an attorney or counselor at law, according to the laws and customs of our courts, is the giving of advice or rendition of any sort of service by any person, firm, or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill.' The practice of law is not limited to the conduct of cases in court, but embraces the preparation of pleadings and other legal papers and conveyances and the giving of advice in matters connected with the law, and includes representing a creditor in bankruptcy proceedings, or in the col-

lection of a claim against one who has made a general assignment for the benefit of creditors. * * *"

The Berk case, *supra*, holds that one who conducts a commercial collection agency, contracting with his patrons to turn claims over to his lawyer for legal proceedings when in his judgment such proceedings are necessary, exacting fees from the makers of notes under provisions therein for the collection of costs, including a reasonable attorney's fee, and threatening debtors with legal proceedings is engaged in the practice of law within the meaning of Section 42(d), *supra*.

And it was held in the case of *Wilkey, et al, v. State ex rel Smith*, 244 Ala. 568, 14 So. (2d) 536, that the adjustment or settlement by lay insurance adjusters of defaulted, controverted, or disputed claims constitutes "practicing law" as defined by Section 42, *supra*. See also the case of *Birmingham Bar Association v. Phillips*, 239 Ala. 650, 196 So. 725.

In the case of *Boykin, Solicitor General, v. Hopkins, et al.*, 162 S. E. 796, 799, 802, the Court overruled its case of *Atlanta Title & Trust Co. v. Boykin*, 172 Ga. 437, 157 S. E. 455. In arriving at the conclusion that the applicant sought to engage in the practice of law unlawfully that Court declared that acts constituting the practice of law are:

"To act as an attorney in fact for the settlement or adjustment of any and all claims; act as an attorney in fact for customers in procuring competent attorneys at law to represent such customers in any court or before any judicial body in this state in any contested or uncontested case or matter pending before such court or body, when an attorney at law is necessary; and furnish legal advice or legal services in connection with matters pertaining to the law."

In a recent New York case, *Application of New York County Lawyers Association, In re Bercu*, 78 N. Y. Supp. (2d) 209, decided April 12, 1948, the Court in holding that certain activities of accountants constituted the unauthorized practice of law said:

"An accountant may know more about the tax law than some law practitioners, just as a labor relations adviser, trust officer or customs broker may know more about the law relating to their businesses than many lawyers not specialists in the law relating to such business. A layman may know a lot of law about a particular subject, upon the knowledge of which he may rely at his own risk in his own business. He may not, however, set himself up as a public consultant on the law of his specialty. If the services of a specialist in some particular branch of the law are required, the public must still turn to the Bar, for all the reasons of public protection for which the Bench and Bar standards are maintained. The law specialist offers more and much more is required of him for admission to practice than knowledge of his specialty. He must have a grounding in the law and a legal education and training,

must pass examinations in the law and attain and maintain standards which are imposed by the Bench and Bar for the protection of the public.

"The law includes many specialties, perhaps as diverse as specialties in medicine, but they are all related and integrated in the common body of the law, much the same as specialties in medicine are linked in the whole body of medicine. One might become informed, and even expert, in some narrow specialty of medicine without the general training, preparation and experience required for admission to practice medicine. Yet we know that only the generally trained doctor, grounded in medicine as a whole, has the understanding requisite to practice medicine in any of its branches, albeit the laboratories, so intimately and vitally connected with medical service, are staffed by technicians who are not medical doctors.

"Similarly, the law specialist should be trained and grounded in the law. A thorough knowledge and understanding of basic legal concepts, legal processes and the interrelation of the law in its parts are quite essential to the practice of law in any of its branches. Technicians are needed to serve in bureaus and agencies and in numerous non-legal capacities, but the counselor licensed and trusted to advise the public with respect to the law must be a duly qualified and admitted lawyer. We are unable, therefore, to regard the admission of accountants, subject to certain qualifications and regulations of the Treasury Department and the Tax Court, to practice before those agencies, as an authorization to accountants to practice tax law at large or as an eradication of the distinction between the lawyer's and the accountant's function in the tax field."

The Supreme Court of Minnesota in the case of *Fitchette v. Taylor*, 254 N. W. 910, 94 A. L. R. 356, in referring to the question of the practice of law by a layman, made the following comments:

"The conduct of litigation is by no means all of legal practice. A lawsuit is but one process of settling an issue of legal right and wrong. Many are disposed of without suit. But the disposition of such issues for others, by advice and negotiation, for hire, is as much the practice of law as though process and pleadings, with or without trial, were necessary. Counsel as to legal status and rights, and conduct in respect thereto, are as much a special function of the English solicitor and American lawyer as diagnosis, prognosis, and prescription are in the special field of medicine. * * *. If compensation is exacted, 'all advice to clients and all action taken for them in matters connected with the law' are practicing law. In *re Duncan*, 83 S. C. 186, 65 S. E. 210, 24 L. R. A. (N. S.) 750, 18 Ann. Cas. 657. * * *."

And the Court said further:

"It is established that the admission to practice of attorneys and their disbarment is a part of the judicial power allocated to the

courts by the departmentalization of our government. * * * Having the power through disciplinary proceedings to protect the public by preventing attorneys from indulging in the unlawful practice of law, it would be anomalous if we had no similar power to protect the public from the illegal practice of law by laymen. * * *

The bar would suffer in such a case, but the people would suffer even more.

This was early recognized in England. For a long period after the Conquest and the setting up of the Norman kings' courts, there was no organized class of attorneys skilled in the law and entitled to practice. Representation by attorneys was unknown to the common law, and it was only by special royal permission in exceptional cases that it was granted. Finally, however, these royal licenses became more and more frequent until certain men began to appear regularly as attorneys for a variety of litigants, and their number grew apparently without much, if any, regulation or control. The result was an abuse that required and received the attention of the Crown. In the year 1292, Edward I, by royal ordinance, limited the number of attorneys and directed his justices to provide a sufficient number for each county. This order is a landmark in the history of the development of English law, and Pollock and Maitland, Vol. 1, 194, *History of English Law*, say of it: "We may infer that already before 1292 these practitioners had acquired an exclusive right to be heard on behalf of others. In that year, King Edward directed his justices to provide for every county a sufficient number of attorneys and apprentices from among the best, the most lawful and the most teachable, so that king and people might be well served. The suggestion was made that a hundred and forty of such men would be enough, but the justices might, if they pleased, appoint a larger number." From this, it is quite clear that a condition, intolerable to the king's people, had grown up by the promiscuous practice around the king's courts of persons unskilled in the law, and untrustworthy. It is equally clear that the object of this first attempt at regulating the bar was the well-being of government and people, and that the duty of bringing that about was expressly charged upon the justices.

There was still, however, no strict regulations, so that in the course of another century the number assuming to act as attorneys had grown to 2,000. Large numbers of these were unskilled and uneducated and had presumed to act as attorneys without warrant. The evil finally became so great that in the year 1402 Parliament this time took cognizance of it and enacted the now famous statute, 4 Henry IV, Ch. 18, which provided that all attorneys should be examined by the justices, and in their discretion only those found to be good and virtuous, and of good fame, learned and sworn to do their duty, be allowed to be put upon the roll and all others put out. As sergeants were regulated already by their inns of court under supervision of the judges, they were not included in this statute. This statute is said by some to mark the beginning of the division of the English bar into barristers and attorneys. It is of interest to us here, however, only to illustrate that the bar arose

out of a public demand for the exclusion of those who assumed to practice law without adequate qualifications therefor. It is also of importance because it shows beyond question that the duty of excluding unauthorized persons was left to the discretion of the justices.

This conception of the practice of the law and its control by the court was the one which the English colonists brought with them to this country. Originally, no one questioned the authority of the court over this matter, or sought to limit it merely to the admission of attorneys to practice in court. Admission to the bar meant admission to practice law, and admission to practice law comprehended all the activities of a lawyer in advising and assisting others in all matters of law both in and out of court. The Supreme Judicial Court of Massachusetts has, in *re Opinion of the Justices to the Senate* (Mass.) 194 N. E. 313, 317, expressed itself most fully on this point as follows: "Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation. They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations. These 'customary functions of an attorney or counsellor at law . . . bear an intimate relation to the administration of justice by the courts. No valid distinction, so far as concerns the questions set forth in the order, can be drawn between that part of the work of the lawyer which involves appearance in court and that part which involves advice and drafting of instruments in his office. The work of the office lawyer is the groundwork for future possible contests in courts. It has profound effect on the whole scheme of the administration of justice. It is performed with that possibility in mind, and otherwise would hardly be needed. . . . It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests upon all attorneys. The underlying reasons which prevent corporations, associations and individuals other than members of the bar from appearing before the courts apply with equal force to the performance of these customary functions of attorneys and counsellors at law outside of courts. Decisions of the courts, some of which deal with statutes, are unanimous on these points, so far as we are aware."

The above views of what is the practice of law are so held by the United States Supreme Court and generally by the State courts. The following is the concise definition given by the Supreme Court of the United States:

"Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be

regarded as attorneys at law within the meaning of that designation as employed in this country."

County Boards of Equalization were established by the 1939 General Acts of the Legislature and are governed by the provisions of Title 51, Chapter 9, Sections 88-113, Code of Alabama 1940. The Boards of Equalization are appointed by the Commissioner of Revenue with the approval of the Governor. Title 51, Section 89, as amended, Code of Alabama 1940. The business of such Boards of Equalization is the valuation and assessment of real and personal property for taxation. Title 51, Section 103, Code of Alabama 1940. Appeals from the final determination of such Boards to the Circuit Court of the County in which the taxpayer's property is located are provided for by Title 51, Section 109, Code of Alabama 1940. The procedure on such appeals and provisions governing appeals from the judgment of the Circuit Court direct to the Supreme Court of Alabama are set out in Title 51, Section 110, Code of Alabama 1940. It is a principle of taxation, that, where the State has once proceeded by its duly constituted agencies to the assessment and valuation of property, the determination is judicial in its nature, and conclusive in its results, unless impeached for fraud or want of jurisdiction or reversed and set aside by some tribunal having authority to review. *State v. Mortgage-Bond Co. of New York*, 224 Ala. 406, 147 So. 365; *Anniston City Land Co. v. State*, 185 Ala. 482, 64 So. 110; *State Tax Commission, et al. v. Stanley*, 234 Ala. 66, 173 So. 609. Such determination being judicial and the Board of Equalization being a quasi judicial body, it appears to be only reasonable to conclude that appearances made before and the preparation and filing of protests with such Board are legal services.

Taxation, which permeates almost every phase of modern life, is so interwoven with nearly every branch of the law that one could hardly pick any tax problem, ad valorem or otherwise, and say this is a question of pure taxation or pure tax law wholly unconnected with other legal principles, incidents, or ramifications.

It, therefore, appears to be beyond dispute that matters before the County Board of Equalization in connection with the valuation and assessment of property, real and personal, are matters connected with the law and all services for compensation to a client in connection therewith, either before the Board of Equalization or in the Circuit Court or Supreme Court on appeal from said Board, is a legal service, and as such is limited to individuals who are authorized to practice law.

Of course, what has been said above does not apply to an individual who is in privity with the taxpayer or with whom he stands in the relation of employer and employee in the ordinary sense. It is my judgment that the word "agent" as used in Title 46, Sections 107 and 109, Code of Alabama 1940, refers to such an individual. Where such a relationship exists between an individual and a taxpayer and that individual acts for the taxpayer in dealings with the Board of Equalization as described in your inquiry, he is not engaged in the practice of law.

In accordance with the views adopted by the courts cited herein as to what constitutes the practice of law and in accordance with the definitions of the practice of law as specified in Title 46, Section 42, Code of Alabama 1940, it is my opinion that the preparing and filing of letters of protest on behalf of the taxpayer with the Board of Equalization and the appearing before the Board of Equalization and presenting the contentions of the taxpayer and attempting to adjust ad valorem assessments as specified in your inquiry clearly constitute the practice of law. Each service specified calls for legal service of some kind. These laymen are engaged in selling legal advice and legal service for compensation and, therefore, such activities constitute the illegal practice of law.

For exhaustive annotations on the subject of practice of law, see the following:

73 A. L. R. 1323;
84 A. L. R. 749;
100 A. L. R. 236;
111 A. L. R. 19;
125 A. L. R. 1173;
157 A. L. R. 522.

It is my opinion that an individual who is not duly licensed to practice law and who holds himself out to the public as being ready, able, and willing for a consideration to do an act which constitutes the practice of law is engaged in the unauthorized and illegal practice of law.

The act of the Legislature, Section 42, *supra*, does not define for all purposes the practice of the law and thereby take the matter out of the control and supervision of the Supreme Court of this State. The section cited does not comprehend all of the many and various acts which may be done within the practice of law. The Legislature merely enumerated some of them and prescribed penalty for the performance of any of them by unauthorized persons. If, however, the Legislature did include all possible acts, it would not impair or restrict the power of the Supreme Court of this State over the practice of the law and in declaring whether or not a particular act or activity of the individual constituted the practice of law. The power of the court to regulate and control the practice of law remains where it has always been, notwithstanding the exercise by the Legislature of its undoubted power to declare acts of unauthorized practice of law illegal and punishable by fine or imprisonment or both. Courts have repeatedly held that members of the legal profession are officers of the Court. *Ex Parte Thompson*, 228 Ala. 113, 152 So. 229. The acts and activities as specified in Section 42, *supra*, in the opinion of the Legislature and so designated by the Legislature, constitute the illegal and unauthorized practice of law. However, the power inherent in the Supreme Court of this State as head of the Judicial Department of the Government to control and supervise the practice of law leads to the conclusion that what constitutes the practice

of law is not limited to the definition or definitions as specified by the Legislature.

In the case of **Bump v. District Court**, 232 Iowa 623, 5 N. W. (2d) 914, the Court said:

"Advertising and solicitation of contracts, the performance of which will involve the rendition of legal services constitute the practice of law."

See also the case of **Bump v. Barnett**, 16 N. W. (2d) 579, and cases cited therein.

In connection with this feature of your inquiry, see Title 46, Section 31, Code of Alabama 1940, which provides, among other things, that if a person not duly licensed to practice law "holds himself out to the public as a person qualified to practice or carry on the calling of a lawyer, he shall be guilty of a misdemeanor and fined not to exceed five hundred dollars or be imprisoned for a period not to exceed six months or both."

Construing the above with the views expressed herein as to what constitutes the practice of law, it is my opinion that an individual who holds himself out to the public as being ready, able, and willing for a consideration to represent taxpayers in securing favorable adjustments before the Board of Equalization is engaged in the business or profession of the practice of law even though no act as specified in Section 42, *supra*, is performed. The act of "holding himself out to the public as qualified to practice" is sufficient, in my opinion, to put him in the business or profession of the practice of law, and if such an individual is not duly licensed to practice law, he is engaged in the unauthorized or illegal practice of the law.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 13, 1949.

Honorable Fred G. Nunnelley,
Chairman, Calhoun County Commission,
Anniston, Alabama.

Sheriffs—Fees—Insanity—Calhoun County.

1. Acts No. 575, General Acts 1943, page 578, governs over the provisions of Title 45, Section 211, Code of Alabama 1940, as to expenses, fees and allowances when a sheriff or his deputy is deputed by the probate judge to convey an insane patient (not charged with a crime) to a State hospital for the insane, after adjudication of insanity. Said Act is applicable whether such patient be indigent or solvent.

2. The mileage fee provided for in Act No. 575, General Acts 1943, page 578, allowable to the sheriff, is considered a fee or compensation for service; and, such fee inures to the benefit of the county when the sheriff thereof is on a salary basis and provision is made that his fees, compensation, and allowances are to be paid into the County Treasury.

3. Opinions in Quarterly Reports of Attorney General, Volume 46, page 41; Volume 49, page 73; and opinion to Sheriff, Etowah County, on December 7, 1948 (Ms.), overruled and withdrawn in part.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of December 15, 1948, is as follows:

"Mr. A. A. Pate, Sheriff of Calhoun County, Alabama, has presented to the Calhoun County Commission on December 9, 1948 a bill for \$419.20 for 'Refund covering the mileage paid for trips to Insane Hospitals, which was collected, then turned over to the County Commission, from Oct. 1, 1947 to Oct. 1, 1948.' The bill includes mileage for transporting to state hospitals for the insane of nine patients. These patients were transported by the Sheriff of Calhoun County, and mileage at the rate of ten cents per mile in removing and transporting said patients was allowed the sheriff by the county commission under Act of the Legislature approved July 7, 1943. See 1943 Acts of the Legislature, page 578. The sheriff's bills for mileage were allowed separately, and in each case the money was paid back into the county treasury as part of the fees and allowances of the sheriff, and as required by an act of the Legislature of Alabama approved July 24, 1947. See 1947 Local Acts, page 101.

"The sheriff of Calhoun County is now claiming that your letter of December 1, 1948, addressed to him in reply to his letter of November 16, 1948, is authority for the allowance of the sheriff's bill for refund of said mileage claims.

"Under the 1947 local act above referred to the Sheriff of Calhoun County is on a salary basis, and is required 'to collect all charges, fees, compensation and allowances authorized to be collected by him' and pay the same into the county treasury of Calhoun County. Code of Alabama, Title 11, Section 34, page 284, also requires all such fees to be paid into the county treasury. The County Commission of Calhoun County is required to furnish the sheriff four automobiles, and all motor fuel for the operation of the same. Local Acts of 1947, page 102, Section 4.

"Under Section 211, Title 45, 1940 Code of Alabama, the Judge of Probate is authorized to depute an officer to convey a patient to the hospital and all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury on order of the County Commission. The bills which were allowed and paid the sheriff, and for which refund is now claimed, were not paid under Section 211 of the Code above referred to, but under the General Acts of 1943, page 578, providing for mileage and fees of the sheriff in transporting or removing insane patients.

"Please furnish the County Commission of Calhoun County your official opinion:

"(1) As to whether or not the sheriff of Calhoun County is entitled to be paid out of the county treasury mileage of ten cents per mile for removing persons to insane hospitals, as provided by 1943 Act of the Legislature, page 578.

"(2) In view of the salary paid to the sheriff of Calhoun County, and the automobiles and motor fuel for the operation of said automobiles furnished him, is he entitled to receive in addition mileage at the rate of ten cents per mile for removing insane patients to State hospitals for the insane referred to in 1943 Acts of the Legislature, page 578.

"(3) Does Section 211, Title 45, 1940 Code of Alabama now apply to the Sheriff of Calhoun County, Alabama? If so, is the sheriff entitled to collect from the county only necessary expenses in conveying an indigent patient to the hospital, or is he entitled to receive ten cents per mile in conveying any insane patient to the hospital, whether indigent or not."

Rather than answer your inquiries categorically, it is deemed expedient to present a general discussion of the matter, which will give you the information you desire.

Title 45, Section 211, Code of Alabama 1940, provides as follows:

"§ 211. Conveying patient to hospital.—The judge of probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital, and all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury on order from the county commissioners."

Generally speaking, under this section, the person or persons conveying indigent insane persons to the hospital for the insane are entitled to be paid all necessary expenses when shown to be reasonable.—Quarterly Report of Attorney General, Vol. 19, p. 125. And, a sheriff was heretofore entitled to be paid such necessary expenses by the county for conveying

such indigent persons to the hospital when he is deputized by the probate judge.—Biennial Report of Attorney General, 1926-1928, page 390.

Act No. 575, General Acts 1943, page 578, provides as follows:

“Section 1. The Sheriffs of the several Counties of the State of Alabama shall receive for arresting and taking into custody any person charged with being of unsound mind the following fees and mileage: \$5.00 for taking any such person into custody, and 10 cents per mile in removing any such person to a State Hospital for the insane; and such Sheriffs shall also receive the same fees for feeding insane prisoners as are allowed by the State for the feeding of other State prisoners.

“Section 2. The fees and mileage provided for in Section one hereof shall be paid from the general fund of the several counties and shall be paid in the same manner and way as other claims against said fund are paid.

“Section 3. This act shall take effect upon its approval by the Governor.

“Approved July 7, 1943.”

The effect of the former opinions of this office is that the 1943 Act, supra, governed over the provisions of Title 45, Section 211, supra, as to expenses, fees, and allowances when a sheriff or his deputy was deputed by the probate judge to convey insane persons to the hospital.—Quarterly Report of Attorney General, Vol. 33, p. 7; Quarterly Report of Attorney General, Vol. 32, p. 177. And, counties are liable for payment of fees and allowances payable to the sheriff in cases where the sheriff is deputed to convey an insane patient (not charged with a crime) to a State hospital for the insane, after adjudication of insanity, whether such patient be indigent or solvent.—Quarterly Report of Attorney General, Vol. 35, p. 87.

In the opinion in Quarterly Report of Attorney General, Vol. 32, p. 177, supra, concerning the Sheriff of Montgomery County, who is on a salary basis, it was observed:

“It is my opinion, therefore that under said Act the Sheriff, whether acting in person or by deputy, whenever deputed by the probate judge to convey an insane patient, nor a prisoner, to the hospital, is entitled for his services or the services of his deputy, the aforementioned ‘mileage’ as a fee or compensation for such services. And if the sheriff is paid a salary such fees of course should be covered into the county treasury.”

It will be noted from the above that the mileage fee of ten cents per mile, allowable to the sheriff under the 1943 Act, supra, is considered a fee or compensation for services.

This being the situation, such mileage fees which were earned by the Sheriff of Calhoun County, after being put on a salary basis, inure to the benefit of Calhoun County under the provisions of Act No. 185, Local Acts 1947, page 101, approved July 24, 1947 and effective October 1, 1947, Section 2 of which provides as follows:

"Section 2. That when this Act goes into effect said Sheriff of Calhoun County shall continue to collect all charges, fees, compensation and allowances heretofore or hereafter authorized to be collected by him, including all monies for feeding prisoners, and shall during the last five (5) days of each calendar month pay into the County Treasury of Calhoun County, Alabama all such monies received or collected by him during the month, or part thereof, next preceding the date of such settlement or payment."

From the foregoing, it follows that Sheriff Pate is not entitled to the refund for the mileage fees in question which accrued subsequent to October 1, 1947, as such fees inure to the benefit of Calhoun County.

The principles above enunciated in regard to the Sheriff of Calhoun County are likewise applicable to the sheriffs of other counties of the State, who are on a salary basis and whose fees, allowances, and compensation accrue to the benefit of their respective counties.

In view of the former conflicting opinions of this office in regard to this matter, this opinion has been very carefully considered. Likewise, the cases of *Mosely v. Kennedy*, 245 Ala. 448, 17 So. 2d. 536; *Dallas County v. Kennedy*, 246 Ala. 558, 21 So. 2d. 678; and *Jefferson County v. Dockerty*, (Ala. App.), 30 So. 2d. 469, cert. denied (Ala.) 30 So. 2d. 474, have been taken into consideration in reaching the above conclusion.

Those portions of the following former opinions of this office holding contrary to the above are hereby expressly overruled and withdrawn:

Opinion to Sheriff of Cherokee County on February 5, 1947 (Quarterly Report of Attorney General, Volume 46, page 41);

Opinion to Sheriff of Etowah County on October 20, 1947 (Quarterly Report of Attorney General, Volume 49, page 73);

Opinion to Sheriff of Etowah County on December 7, 1948 (Ms.).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 14, 1949.

Hon. Kenneth Cooper,
Circuit Solicitor,
Baldwin County,
Bay Minette, Alabama.

Counties—Solicitors.

The county is without authority to furnish the office of the circuit solicitor with office furniture, typewriters, tables, chairs, etc.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of December 31, 1948, is as follows:

"Reference our conversation December 29th concerning office equipment for the solicitor's office of the newly created 28th Judicial Circuit, Baldwin County.

"Section 240, Title 13, Code of Alabama, 1940, provides, 'The several counties of the state are hereby authorized, directed, and required to provide suitable offices for the use and occupancy by such circuit solicitors, deputy circuit solicitors, and assistant deputy circuit solicitors, in the county where such officers reside, and the state shall furnish such offices and officers with telephone service, stationery, stamps, and other necessary equipment for the use of such offices and officers. . . .'

"As has been pointed out, the limited funds available from the state make it impossible for the state to supply office furniture, typewriters, tables, chairs, etc.

"The Board of Commissioners has been approached and requested to supply all items needed to furnish the new office, exclusive of stamps, stationery, telephones and similar materials. However, the Commissioners feel that under above quoted provision of the Code of Alabama it has no authority to make such expenditures. It has, on the other hand, indicated its willingness to supply everything needed if your office indicates, in writing, authority for such expenditures.

"In view of the Board of Commissioner's position in this case, a ruling is requested as to whether authority exists under Section 240, Title 13, Code of Alabama, 1940, for the Commissioners to purchase all equipment needed to furnish the solicitor's office of this new circuit. If such authority does not exist under above quoted pro-

vision of the Code does authority exist under any other provision of state law?

"As stated in our telephone conversation, the new circuit will not have a library for use. However, arrangements have been worked out between the Circuit Judge, Mr. Mashburn, and myself which will suffice for some time. Later, we feel, we might work out some plan for supplying a law library."

Title 13, Section 240, Code of Alabama 1940 (the statute referred to in your letter), as amended by Act No. 53, General Acts of 1947, page 23, provides in part as follows:

"The several counties of the state are hereby authorized, directed, and required to provide suitable offices for the use and occupancy by such circuit solicitors, deputy circuit solicitors, and assistant deputy circuit solicitors, in the county where such officers reside, and the state shall furnish such offices and officers with telephone service, stationery, stamps, and other necessary equipment for the use of such offices and officers."

Under the provisions of the above statute, the county where the circuit solicitor resides is required to furnish him with a suitable office, and the State is required to furnish such office and officer with telephone service, stamps, and other necessary equipment for the use of such office and officer.

The words "other necessary equipment" used in Section 240, *supra*, were construed in an opinion of this office found in Quarterly Report of Attorney General, Vol. 20, page 104, to include "the visible, tangible furniture, fixtures and filing cabinets, typewriters and other apparatus which are usual and necessary for the operations conducted by a solicitor. It includes whatever things are proper, useful and suitable to the office of the solicitor in furtherance of the discharge of the duties imposed upon him by law. Cf. Biennial Report of Attorney General, 1928-30, p. 196; Quarterly Report of Attorney General, Vol. XVIII, p. 307."

"Counties may exercise only such powers as are expressly delegated to them by the Legislature and such additional powers as may be necessary for the exercise of express powers where the Legislature has not specifically provided the mode or manner of exercising express powers. *Arledge v. Chilton County*, 237 Ala. 96; *Poyner v. Whiddon*, 234 Ala. 168; *Stone, ex rel. Towle vs. Stone*, County Treasurer, 236 Ala. 82. Quarterly Report of Attorney General, Vol. 37, page 63.

In answer to your inquiry, it is my opinion that under the provisions of Section 240, *supra*, a county is only authorized to provide the solicitor with a suitable office. Said section specifically provides that "other necessary equipment" (which includes office furniture, typewriters, tables, chairs, etc.) shall be furnished by the State.

There is no statute authorizing the county to furnish the office of the circuit solicitor with office furniture, typewriters, tables, etc.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 14, 1949.

Hon. Chas. R. Hackmeyer, Member,
Board of Revenue and Road Commissioners,
Mobile County,
Mobile, Alabama.

Counties—Contracts—Roads and Bridges.

The governing body of Mobile County may fix a minimum wage scale for work done in connection with proposed road construction jobs, and require adherence to such fixed scale as a condition precedent to awarding of contracts for such jobs.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion dated September 12, 1948, is as follows:

"At an election duly held in Mobile County on September 30, 1947, the voters authorized the issuance by Mobile County, for the improvement of thirty-nine (39) separate Mobile County road projects, of \$4,500,000 of its Road and Bridge Bond Series 1947, payable from its special five mill tax levied under constitutional amendments and legislative acts relating only to this County. On February 19, 1948, our county sold the aforesaid issue of bonds and recently received bids for and made awards of contracts for the improvement of fifteen (15) of such road improvement projects. In accordance with the written opinion of our County Attorney, William V. McDermott, that our Board was without authority to do, the County Board did not in advertising for bids, or in awarding said road improvement contracts, require or attempt to require the employment of union labor exclusively, or fix or attempt to fix a minimum scale of wages based on the prevailing wage scale for the various type of work involved as conditions precedent to awarding such road construction contracts.

"For the purpose of answering the question hereinafter asked of you by me, you will probably want to examine the pertinent authority for the aforesaid bond issue, and they are as follows: Amendment 18 to Constitution of 1901; Local Acts 246 of 1927, pages 151-163; Local

Act 160 of 1931, pages 51-54; proposed Constitutional Amendment 9 voted favorably on November 5, 1936, for which see General Acts 1945, pages 681-683; and Local Act 349 of 1945, pages 167-171.

"Now our County Board contemplates in the very near future publishing advertisements calling for bids to carry out the authorized improvement of another group of roads within the aforesaid bond issue, and our Board has been requested, as a condition precedent to the award of any future contracts for the improvement of roads authorized by said bond issue, to adopt the federally recognized prevailing wage scale in this locality as the minimum wage required to be paid by the successful bidding contractors as a condition precedent to awarding such contract.

"Your official opinion is therefore earnestly and promptly requested on said important public question which I believe may be briefly put as follows:

"May the governing body of Mobile County adopt and fix a scale of minimum wages for the various type work involved in carrying out such proposed road construction jobs, and then as a condition precedent to awarding a contract therefor, require the contractor to adhere to such wage scale in carrying out any given road improvement project?

"You are advised, in considering this request, that the roads here involved are public roads in Mobile County, adopted and maintained as such by Mobile County exclusively, and the public funds to be spent on the authorized improvement of such roads are the exclusive funds of Mobile County realized for such purpose as I first herein set forth. And for your further information in the premises, there is enclosed herewith a copy of the opinion in writing dated March 6, 1948, as submitted to this board by County Attorney McDermott."

The question posed turns on the words "lowest responsible bidder" in Title 23, Section 54, Code of Alabama 1940. (Emphasis supplied.) The word "responsible" purports to give the county governing body discretion when selecting among bidders. The members of the governing body have sufficient discretion to require conditions which, in their opinion, will tend to insure that good roads will be built in expeditious fashion. In order to answer the propounded question in the negative, one would have to say that in all cases a minimum wage requirement would be a gross abuse of discretion and that the requirement had no relation to expeditious construction regardless of what local labor conditions prevail. It is impossible to say that.

Any number of hypothetical local contingencies may arise which would make such a provision seem reasonable to the county governing body. The locality might be highly unionized, and labor strife, slowing or completely stopping construction, might result from an absence of

minimum wage provisions. The Board might feel that better workers would be employed by companies paying a minimum wage. Clearly a requirement of certain construction materials, or of certain safety devices would be no violation of Section 54, *supra*. The instant requirement is available to local governing bodies in the light of modern economic conditions. *Stover v. Winston*, 185 Washington 416, 55 P. 2d 821, appeal dismissed 299 U. S. 508, 57 Supreme Court 44, 81 L. Ed. 376; *Schmitt v. Milwaukee*, 185 Wis. 119, 200 N. E. 678.

Certain sections of the Alabama Constitution of 1901, cited in the opinion of the county attorney, are inapplicable. Section 103 gives the State Legislature the power to pass laws in the nature of "anti-trust" laws. Section 22 deals with impairing obligations of contracts, and here we are concerned with no existing contracts. Section 108 deals with the exemption of individuals, private corporations, and associations from the operation of general laws, and is, therefore, patently inapplicable.

No "due process" or "equal protection" objections are appropriate. Nobody is prevented from bidding. The county merely states its requirements. It may state that minimum wages, or certain kinds of cement, or safety devices are required of those to whom it lets its contracts. Those who are willing to meet the requirements are able to bid. The argument that there is an absolute freedom of contract was laid to rest finally and irrevocably by the United States Supreme Court in *West Coast Hotel Company v. Parrish*, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703, (upholding the constitutionality of State wages and hours laws), and *U. S. v. Darby*, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609, (upholding the Federal Fair Labor Standards Act, which included minimum wage provisions.) In the case of the proposed road contracts, there is not even any compulsion as to payment of the minimum wage. A person would pay such wage only if he desired to contract with the county. Certainly, if it is not unconstitutional to legislate regulating freedom of contract of all employers, it is not unconstitutional for a county to require a minimum wage only as a condition for a contract with the county. It is advised, however, that the county governing body determine the minimum wage scale independently which rate, so fixed, may or may not be the federally recognized prevailing wage scale in your locality.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 17, 1949.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Courts of County Commissioners — Roads and Bridges —
Contracts.

1. An agreement entered into between the governing body of the county and a contractor relative to the repair or construction of bridges providing that the county shall pay all costs arising for labor and material, a stipulated rental upon the equipment used, and likewise an agreed percentage on the total costs on all labor, material and rentals as compensation for supervision of such work is, in fact and effect, a contract between the county governing body and such contractor.

2. The county governing body may not enter into a contract for road or bridge construction where estimated cost of such work exceeds \$250.00 without advertising for bids as required by Title 23, Section 54, Code of Alabama 1940, unless such work of construction or repair is of emergency nature as defined by Title 23, Section 55, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of December 27, 1948, is as follows:

"Across the streams on our county roads in Dale County, we have a number of bridges that offer a constant hazard to the traveling public.

"It is the desire of the County Governing Body to replace these with bridges of permanent construction. We have in the county a thoroughly capable and reliable bridge builder whose supervision we wish to acquire for this work.

"The plan we have under consideration is for the county to pay for all materials and labor as invoices and payrolls are presented to the Court; also, to pay State Highway Department rentals for his bridge building equipment—truck, pile driver, etc.; and to pay him an agreed percentage on the total cost of all labor, materials and rentals for his service of supervision as rapidly as bridges are completed.

"Our plan is to hire this man to supervise the construction of these bridges for Dale County. It will not be a contract undertaking at all.

"What we wish your opinion on is: May we proceed as outlined without the formality of advertising for bids? This will greatly expedite the work."

In my opinion, your inquiry must be answered in the negative for the reason that if such a plan or agreement as that outlined in your inquiry were to be held valid, it would in effect allow the county governing body to completely avoid the provisions of Title 23, Section 54, Code of Alabama 1940.

In the first instance, it is my opinion that such a plan or agreement, whether considered and styled by you as a contract, is in fact a contract undertaking. Under the terms of such agreement, as I understand them, the county not only agrees to pay all cost arising for material and labor but also agrees to pay to the contractor concerned a stipulated rental upon the equipment used in the construction of such bridges, and likewise an agreed percentage on the total cost of all labor, material and rentals as compensation for his services in supervising such construction. Such an agreement, in fact, covers all component elements present or necessary in the construction of a bridge, and, in my opinion, constitutes nothing more than what is commonly known as a "cost-plus" contract between the county governing body on the one hand and the contractor concerned on the other. A like situation was considered in a former opinion of this office found reported in Quarterly Report of Attorney General, Volume 7, page 101, and a like conclusion there reached.

The provisions of Title 23, Section 54, *supra*, to which I have previously referred, are as follows:

"No contract where the estimated cost of the work shall exceed two hundred and fifty dollars shall be made except after advertisement for thirty days in some newspaper published in the county, describing the character of the work to be done and the time and place of letting, and then only to the lowest reasonable and responsible bidder for such work, who shall enter into bond in double the amount of such bid, conditioned for the proper performance of such contract according to the plans and specifications and within the time prescribed by the order of the court or board of such work, which bond shall be approved by the judge of probate of said county. Where the estimated cost of the work exceeds twenty-five hundred dollars, advertisement as above must also be made in a daily paper published in this state, of at least five thousand daily circulation once a week for thirty days. Such court or board shall have the right to reject any or all bids."

The only exceptions thereto are found within Title 23, Section 55, Code of Alabama 1940, and are as follows:

"In the event of the destruction of a bridge, or damage thereto, rendering the same impassable, or in any other emergency, the county commissioners, board of revenue, or other governing body may contract for the repair or rebuilding of such bridge without advertisement, if the public good requires it, except in cases where the highway department has jurisdiction over such bridges."

In my judgment, the provisions of Title 23, Section 54, *supra*, are mandatory. Cf. Biennial Report of Attorney General, 1926-28, page 100. Such being the case, it is my opinion that, in the absence of conditions which might be deemed an emergency within the meaning of Title 23, Section 55, *supra*, and the cost of such proposed construction exceeding the figure set out in Title 23, Section 54, *supra*, it is mandatory that the county governing body comply with the requirements as to advertising for bids set out therein.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

January 17, 1949.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Courts of County Commissioners — Roads and Bridges —
Municipalities—County Engineer.

The county governing body, with the consent or permission of the municipality concerned, may lawfully direct or allow the county engineer, whose salary is paid from funds accruing to the county as its share of the gasoline tax, to make surveys and plans for paving the streets of an incorporated municipality of the county under the authority of Title 23, Section 49, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of December 17, 1948, is as follows:

"The Commissioners Court of Dale County have asked me to request your official opinion on the following point:

"May the County Governing Body legally expend County Gasoline Tax Funds in paying the salary of the County Engineer to make surveys and plans for paving streets in the Incorporated towns of the County?

"I fail to find where this point has ever been ruled on by your office. If, however, there is an outstanding opinion on this particular point, I will thank you to direct my attention to it.

"Your usual prompt attention will be greatly appreciated."

In my opinion, your inquiry must be answered in the affirmative.

It is provided by statute that that portion of the gasoline tax accruing to the individual counties shall be used by such counties, with certain exceptions not here pertinent, exclusively for the construction, maintenance, supervision and policing of the public roads and bridges of the respective counties. Title 51, Sections 647-657, Code of Alabama 1940, as amended.

Regarding the authority of the county governing body to appoint and employ a county engineer, it is provided by Title 12, Section 67, Code of Alabama 1940, that the salary of such engineer shall be:

"* * * payable in equal monthly installments from the county road and highway funds of the county, so shown by county contracts made with county engineer and entered of record. * * *"

As to the duties of such person, it is provided by Title 12, Section 69, Code of Alabama 1940, that it shall be his duty to:

"(1) Employ, supervise and direct such assistance as are necessary to properly maintain and construct the county public roads, highways and bridges; (2) perform such engineering and surveying service as may be required and to prepare and maintain the necessary maps and records; (3) maintain the necessary accounting records to reflect the cost of the county highway system, and (4) perform all other duties necessary and incident to the operation of a county highway system."

As to what constitutes the "public roads" of the county over which the county governing body exercises general superintendence, it was held, even prior to the adoption of the present Highway Code by Act No. 347, General Acts 1927, page 348, that such jurisdiction and authority was not confined to public county roads, but rather that it was proper for the county governing body to appropriate county funds not otherwise set apart towards the partial payment of improvements of a town of the streets and sidewalks around a block occupied by county buildings. *Eutaw v. Coleman*, 189 Ala. 164, 66 So. 464.

It is only proper to note that at the date of issuance of the above decision in 1914, certain of the justices expressed themselves as being

in disagreement with the holding that the county governing body exercised any measure of control and jurisdiction over the streets or roads located within the limits of the incorporated municipalities of the county.

However, within Act No. 347, supra, approved August 23, 1927, there is found the express provision, now codified as Title 23, Section 49, Code of Alabama 1940, that:

"The court of county commissioners or like governing body of any county, with the consent or permission of the city council or governing body of any municipality, may establish, construct and maintain any road, street or bridge within the corporate limits of such municipality, except in cases where the highway department has jurisdiction over such road, street or bridge."

It is, therefore, my opinion that, with the consent or permission of the governing body of the municipality concerned, the county governing body may lawfully direct or allow the county engineer, whose salary is paid from funds accruing to the county as its share of the gasoline tax, to make surveys and plans for paving streets within such municipality. In my judgment, such activity is so related to the establishment and construction of public streets as to constitute an integral part thereof and thereby fall within the authority granted the county governing body by Title 23, Section 49, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 18, 1949.

Hon. C. M. Harwell,
Sheriff, Madison County,
Huntsville, Alabama.

Bonds—Bail—Appeal Bond—Interest.

1. A final judgment on forfeiture of a bail bond or appeal bond bears interest from the date of rendition.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of January 7, 1949, is as follows:

"On March 19, 1935, the Court of Appeals in the case of Alfred Porter vs. State of Alabama, 8 Division #18, affirmed a judgment of conviction against the Defendant rendered in the Circuit Court

of Madison County. The defendant not surrendering himself to the Sheriff within the time provided in such cases, a forfeiture against his bondsmen was taken and made final on June 14, 1939 for the sum of Seven Hundred and Fifty Dollars and Costs.

"Also in due course an execution issued against said bondsmen was returned 'no property found.' On December 28, 1939, H. M. Hughes, as Clerk of the Circuit Court filed his certificate in the office of the Probate Judge of Madison County to the effect that, 'The State of Alabama and Madison County, Alabama, Plaintiff, recovered of L. F. Nicholson and C. C. Powers, in the Circuit Court of Madison County, Alabama, judgment for the sum of Seven Hundred and Fifty Dollars and for the further sum of Forty Seven Dollars and Five Cents Costs of suit and that Solicitor Jeff D. Smith is Plaintiff's Attorney of record. That the Plaintiff is the owner of said judgment and that no property of the Defendant is exempt from levy and execution.' On December 5, 1948 another execution was issued under the original judgment in this cause.

"In making the money to satisfy this judgment should I charge interest from the date of the judgment, from the date it was recorded, or from the date the Sheriff declared said bond forfeited, or shall I charge any interest at all.

"Please render me your opinion on this question as soon as possible as the last execution is now in my hands and before making a levy on the same I must know how much money it will be necessary for me to make. I can now realize \$399.00 on this judgment without further proceedings, by way of compromise."

In my opinion, a final judgment of forfeitures of an appeal bond bears interest from the date that said judgment is rendered.

The appeal bond referred to in your inquiry is a bail bond conditioned upon the defendant's appearance at court from time to time and to abide such judgment as may be rendered on appeal. When such bond is forfeited, it is forfeited as provided in the Code for other bail bonds. Title 15, Section 372, Code of Alabama 1940.

Proceedings for forfeiting a bail bond are outlined in Title 15, Section 212, et seq., Code of Alabama 1940. Such procedure is proper when the defendant fails to appear after his appeal has been unsuccessful. *Ex Parte City of Russellville*, 246 Ala. 130, 19 So. 2d 601, answering questions in 31 Ala. App. 557, 19 So. 2d 604.

The judgment on forfeiture of a bail bond may be made absolute or final for the entire sum expressed in the undertaking. Title 15, Section 217, Code of Alabama 1940. It has been held that judgment on such forfeiture cannot exceed the principal amount of the bond. *Graham v. State*, 12 Ala. App. 502, 67 So. 624.

However, all judgments in this state, by statute, bears interest from the date of rendition. Title 9, Section 63, Code of Alabama 1940.

Section 63, *supra*, provides as follows:

"Judgments and decrees for the payment of money, other than costs, bear interest from the day of rendition."

Our Supreme Court at an early date held that interest may be collected on an execution issued on the judgment. *Ijams v. Rice*, 17 Ala. 404; see also Quarterly Report of Attorney General, Vol. 30, p. 100. The sheriff is required to endorse on the execution a separate statement of the amount of interest collected. Title 7, Section 540, Code of Alabama 1940.

Although there is some conflict among the authorities on the question of whether or not interest is chargeable upon the breach of a penal or bail bond, the weight of authority, in my opinion, holds that interest may be collected at least after the penalty of the bond becomes merged in a judgment..

"It has generally been held that the state may recover interest from the date of the judgment of forfeiture of a bail bond." 6 Am. Juris. 123.

"The view that interest cannot be allowed in excess of the amount of the penalty will not prevent a judgment for damages equaling the penalty from drawing interest from the date of its rendition." 9 C. J. 133.

"Interest is allowed on recognizances from the time of forfeiture." 6 C. J. 1042.

"But it has been held that interest from the date of the judgment of forfeiture of a bail bond is recoverable by the state." Ann. Cas. 1916c, 114:

See also *Swerdsfeger v. State*, 21 Kan. 475; *State v. Sullivan*, 12 La. Ann. 720; *State v. Frazier*, 52 La. Ann 1305, 27 So. 799; *Kinney v. State*, 14 Ohio Cir. Ct. 91, 7 Ohio Cir. Dec. 97.

I conclude, therefore, that you should collect interest when making your levy and that said interest should be charged from the date of the rendition of the judgment of the court making said forfeiture final.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 18, 1949.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Municipal Corporations—Licenses.

The privilege of making deliveries of merchandise within the corporate limits of a municipal corporation is a privilege subject to the power of the municipality to tax.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of December 28, 1948, is as follows:

"Does a Municipality have the legal right to charge a license for delivery of merchandise in its confines, where no solicitation by salesman has been made, merchandise purchased and paid for outside the Municipality and the delivery in the taxing City is the only act performed by the Vendor on whom the license is imposed. Such is the following incident.

"A resident of an adjoining County and Town comes to Dothan and purchases household furniture. The seller agrees to deliver the merchandise to his hometown. There has been no solicitation by a salesman, but upon the delivery of the goods by the seller's truck the City Officials demand a license for unloading and delivery.

"I am unable to find any statute to cover this. Your early reply will be appreciated."

My answer to your inquiry is in the affirmative.

The Supreme Court in the case of the *City of Enterprise v. Fleming*, 240 Ala. 460, 199 So. 691, had occasion to consider a question very similar to the question presented by you. In the *Fleming Case*, a city ordinance of the City of Enterprise, which placed a license tax against each person, firm or corporation engaged in delivering gasoline or other motor fuel to a tank or station, was under attack. In that case, the Supreme Court made the following observation:

"The privilege of making deliveries of motor fuels within the corporate limits to filling stations is a privilege subject to the power of the municipality to tax, conferred by Chapter 43, Article 32 of the Code, 1923, and is a reasonable basis for classification and the

levy applies equally to all within the class. *Woco Pep Co. of Montgomery v. City of Montgomery*, 219 Ala. 73, 121 So. 64; *Edgil v. City of Carbon Hill*, 214 Ala. 532, 108 So. 355; *Town of Guntersville v. Wright*, 223 Ala. 349, 135 So. 634."

I can see no legal distinction from a city ordinance levying a privilege license on the delivery of furniture or any other merchandise from the ordinance levying a privilege license on the delivery of gasoline as considered in the *Fleming Case*.

You are, therefore, advised that, in my opinion the town inquired about in your inquiry had a legal right to pass the ordinance levying a privilege license on delivery of furniture within its corporate limit.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 20, 1949.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
State of Alabama,
CAPITOL.

Corrections and Institutions, Department of—Convicts—Prisons and Prisoners—Costs and Fees.

Convicts may, in answer to public convenience and necessity, be used and employed as motor vehicle drivers and helpers, outside of prison walls, during transaction of State business, necessary expense for their food and lodging while in travel status being a proper charge against the State provided no prison or road camp is available at the point of overnight stop.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of December 3, 1948, is as follows:

"It has been, and still is, the practice of the Department of Corrections and Institutions to use convicts, both white and colored, that have been duly sentenced to the penitentiary, in the capacity as drivers and helpers for employees and officials of the Department.

"This involves out of town, and in a good many instances, overnight trips.

"Expense accounts of the employee would include expense of the convict, either on the unit basis of \$1.25 or \$5.00 per day, or as reimbursement as expense, the expense of the convict claimed being paid to the employee.

"Will you please give me your official opinion in answer to the following:

"1. May convicts that have been sentenced to the penitentiary be used in this capacity?

"2. May a convict be legally allowed to occupy a hotel room overnight, even though in custody of an employee of the department, rather than being incarcerated in a jail or prison camp overnight for safe-keeping?

"3. If you hold that convicts sentenced to the penitentiary must be kept within the confines of the various prisons and road camps, would such expenditures heretofore made to employees for expense of the convicts while away from the penitentiary be legal expenditures of public funds?

"For your clearer understanding of this matter, we are enclosing copies of five expense accounts and copies of two letters, October 3, 1947 and March 1, 1948, issued by the Department, pertaining to this matter."

The management and control of State prisoners convicted of crime is for the Legislature within the constitutional limitations against cruel and unusual punishment. *Allgood v. State*, 20 Ala. App. 665, 104 So. 847, subsequently overruled for reasons not here material. The will of the Legislature is expressed in Title 45, Section 28, Code of Alabama 1940, which provides that State convicts shall be employed at such labor and in such places and under such regulations within the state as may be determined by the Director of the Department of Corrections and Institutions, with the approval of the Governor.

Section 28, *supra*, commits to the Director a wide discretion in the hiring or employment of convicts subject to his appropriate control.—*State v. Montgomery Savings Bank*, 199 Ala. 365, 74 So. 942. All of his activities are referable to the government, care, use, and preservation of those suffering the penalties of offended law.—Title 45, Section 11, Code of Alabama 1940. He has power and authority to establish and promulgate rules and regulations with respect to the manner of performance of all functions and duties of the Department.—Title 45, Sections 3 and 8, Code of Alabama 1940. In the absence of statutory conflict, the Department's rules and regulations, properly promulgated and approved by the Governor, have, for the purposes of prison administration, the full force and effect of law. Title 45, Section 25, Code of Alabama 1940.

The use, by such Department's officers, persons, or guards, of convict drivers and helpers is not, in my judgment, "cruel and unusual punishment." On the contrary, since generally only "trusties" are selected for this purpose, convicts regard it as the reverse, and as recognition of good behavior. Therefore, I am of the opinion that convict drivers and helpers may so be employed, outside of prison walls, under appropriate rules and regulations promulgated by the Director and approved by the Governor, if such officers, persons, or guards during such travel are engaged in discharging official state business and such convict's employment in that manner conforms to the State's convenience or necessity.

Since the Director has the power, and is charged with the duty, of properly feeding, clothing and housing convicts committed by law to his care and management, it follows that he has authority to pay their necessary and actual expense for food and lodging incurred by or in behalf of the convict while in official travel status, provided such convict is not in some other manner furnished food and lodging at public expense, and provided such actual expense does not exceed \$5.00 per diem. See the Director's order of March 1, 1948. Title 41, Section 154, Code of Alabama 1940, as amended by Act No. 238, General Acts 1943, page 195, provides for a maximum travel allowance for "a person traveling in the service of the State of Alabama or any of its agencies, institutions, boards, bureaus or commissions," etc. In my judgment this statute is broad enough to cover convicts traveling on State business. Where, however, such convict is at a prison and can eat with the regular line and sleep in the prison, in my opinion, any charge against the State by such employee or official for the convict's food and lodging would not be a proper charge. See the Director's order of October 3, 1947.

Inherent in the Director's power and duty to superintend the management of convicts, and all subordinate officers, persons and guards, is the authority to delegate their safekeeping to subordinates. The clear implication of Title 45, Section 29, Code of Alabama 1940, is that the individual officer, person, or guard may exercise his sound judgment and discretion, subject to existing rules and regulations, in deciding whether the prisoner must be secured for the night. He is responsible for the prisoner's safe-keeping and should he willfully, or through gross carelessness or negligence, violate the Department's rules and regulations, resulting in an escape, he would be subject to prosecution. Title 14, Sections 147 and 148, Code of Alabama 1940. The officer, person, or guard must act in accordance with existing rules and regulations, and the Director's order of October 3, 1947, relieves him of that discretion when a prison or road camp is available at the point of overnight stop.

1. Your first question has been answered in the affirmative.
2. The first half of your second question is answered in the affirmative. I have already pointed out that the officer, person, or guard exercises his discretion, subject to existing rules and regulations, in deciding

whether the prisoner must or should be secured for the night. The second half of your second question is moot, for the reason that, as already explained, the Director's order of October 3, 1947, provides that when a convict driver or helper is at a prison "he will eat with the regular line and sleep in the prison, for which no charges will be made."

3. My answer to your third question is that, under existing rules and regulations, convicts sentenced to the penitentiary must be kept within the confines of the various prisons and road camps provided such a prison or road camp is available at the point of the overnight stop, and that expense incurred in violation thereof is not a reimbursable item. Hence, any expenditure in violation of the Department's rules and regulations is not a legal expenditure of public funds. If, however, no such facilities are available at the point of overnight stop, then the expense of the convict's food and lodging is a legal expenditure of public funds. If, in the judgment of the officer, person, or guard responsible for his safe-keeping, the prisoner should be secured for the night, and no state prison or road camp is available, Section 29, *supra*, makes provision for his incarceration in the local city or county jail. In such event no charge could be made by the officer, person, or guard for the prisoner's food and lodging since it is provided that the local jailer may charge back against the State the legal charge of feeding prisoners.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 20, 1949.

Hon. Howell Turner, Chairman,
Board of Pardons and Paroles,
State of Alabama,
CAPITOL.

Officers and Offices—Office of Profit—Probation and Parole Officer.

1. One holding any public office carrying with it the exercise of a part of the sovereign power of the State, the salary, fees, or other compensation of which is fixed by law, holds an office of profit within the meaning of Section 280, Constitution of Alabama 1901.

2. It is not necessary that such office, to be an office of profit, carry with it a definite and prescribed term fixed by law.

3. One serving as a Probation and Parole Officer is merely an employee of the State Board of Pardons and Paroles, and does not hold an office of profit.

4. Former opinions of this office holding that to constitute an office of profit within the meaning of Section 280, Constitution of Alabama 1901, such office must have a definite term fixed by law, are hereby overruled, or modified, to conform to the opinion expressed herein.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 5, 1949, is as follows:

"The State Board of Pardons and Paroles has asked that I request your official opinion on the following question:

"Is a probation and parole officer, appointed under the provisions of Title 42, Code of Alabama, 1940, eligible to serve as a member of the Civil Service Board of the City of Florence, Alabama, said Civil Service Board having been created by Local Act No. 437 passed at the regular session of the legislature, 1947?

"The reason for this request is that a probation and parole officer has been appointed as a member of the Florence Civil Service Board, and the State Board of Pardons and Paroles desires to know whether or not he is eligible to serve."

In my opinion, your inquiry must be answered in the affirmative.

It is provided by Act No. 437, Local Acts 1947, page 291, the act creating and establishing the Civil Service Board of the City of Florence, that "No person shall be eligible to be a member of said board who holds any office of profit under the City, County, or State."

Your inquiry, therefore, addresses itself solely to the question of whether one serving as a Probation and Parole Officer holds an office of profit as such term is used within the Constitution and statutes of this State. In my judgment, he does not.

The Supreme Court of the State has upon more than one occasion expressed its opinion as to the meaning of such term as used within Section 280, Constitution of Alabama 1901, the most frequently cited and quoted opinion being that found within the decision rendered in the case of *State ex rel. Glenn v. Wilkinson*, 220 Ala. 172, 124 So. 211. It is there stated by the Supreme Court that:

"On further and more mature consideration, we are of opinion, and so hold, that any state, county, and municipal office, whether elective or appointive, carrying as a necessary incident to its exercise

some part of the sovereign power of the state, the term and salary or perquisites of which are fixed by law, is an office of profit within the purview and meaning of section 280 of the Constitution of 1901. *State v. Sanders*, 187 Ala. 79, 65 So. 378, L. R. A. 1915A, 295."

As I construe the opinion in the above-cited case, it is there held by the Supreme Court that any public office, the holder of which exercises some part of the sovereign power of the State, and the term and salary of which is fixed by law, is an office of profit within the meaning of the Constitution of this State. However, it does not necessarily follow, nor do I consider it the opinion of the Court, that it is mandatory that an office to be deemed an office of profit must carry with it all of the above-stated features. In this respect, it is my opinion that a public office, to be deemed an office of profit within the meaning of Section 280 of the Constitution, need only be an office which carries with it some exercise of the sovereign power of the State, with the fees, salary or other compensation granted the holder thereof being fixed by law. In my judgment, it is not an indispensable requisite that such office carry with it a term prescribed and fixed by law. It would only be necessary to consider this factor when dealing with the provisions of Section 281 of the Constitution as to whether the salary, fees or compensation of the holder of such office might lawfully be increased or decreased during the term for which he was elected or appointed.

Adverting now to the statute under which a Probation and Parole Officer is employed, it is provided by Title 42, Section 2, Code of Alabama 1940, that:

"The board, with the approval of the governor, may appoint a secretary and such clerical, stenographic, supervisory and expert assistants as may be necessary to carry out the provisions of this chapter. However, the selection of such assistants and the fixation of their salaries shall be subject to the provisions of the merit system."

The "board" referred to in the above statute is the State Board of Pardons and Paroles, created under the authority of the preceding section, and, in my opinion, it is clear from the provisions of Title 42, Section 2, *supra*, that those persons employed as Probation and Parole Officers are nothing more than employees of such Board of Pardons and Paroles, and that the salary or compensation of such persons is not fixed by law, but rather that such salary or compensation is fixed by the Board of Pardons and Paroles within the provisions of the State Merit System pertinent thereto. Such statute only provides that such persons be paid for their services, there being no attempt to fix their salary by law. It is, therefore, my opinion that in this respect, such office fails to qualify as an office of profit.

The duties of those persons serving as Probation and Parole Officers are prescribed by Title 42, Section 23, Code of Alabama 1940. An exami-

nation of this statute discloses that the duties performed by such persons are purely ministerial in nature, and are performed at the direction of the Board of Pardons and Paroles or one of the courts of the State. Such persons exercise no independent authority involving the sovereign power of the State. The fact that to enable such persons to carry out the duties assigned them by the Board of Pardons and Paroles or the courts of the State, they are vested with the power to make arrests and to execute processes, does not, in my opinion, place such persons in any different category from that of a deputy sheriff, whom the Supreme Court has specifically held does not hold an office of profit. *Ward et al v. State ex rel. Goldsmith*, 203 Ala. 306, 82 So. 662.

It is, therefore, my opinion that, in addition to having no salary or compensation fixed by law, one serving as a Probation and Parole Officer exercises no part of the sovereign power of the State, and for this latter and additional reason, does not hold an office of profit. The further fact that such person holds his position of employment for no definite period of time, I have not considered, as I do not deem such fact pertinent to your inquiry.

For the reasons above set out, I am clear to the conclusion that one serving as a Probation and Parole Officer does not hold an office of profit, but is nothing more than an employee of the State Board of Pardons and Paroles, and is, therefore, eligible to serve as a member of the Civil Service Board of the City of Florence, if appointed thereto.

Former opinions of this office holding in effect that to constitute an office of profit within the meaning of Section 280, Constitution of Alabama 1901, such office must have a definite term prescribed and fixed by law, are hereby overruled or modified to conform to the views expressed herein.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 26, 1949.

Hon. Lloyd G. Hart,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Elections—Constitutional Amendment.

The election authorized to be held by Act No. 357, General Acts 1947, page 241, shall be held in such manner as the county governing body of the several counties of the state shall prescribe.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of December 1, 1948, is as follows:

"Please give me an official ruling on the Proposed Amendment No. 5 which was voted upon and passed by the majority of the voters on November 2nd, 1948 General Election; the Amendment being as follows:

"Shall the following be adopted as an amendment to the Constitution of Alabama? To authorize the governing bodies of the several counties of the State to levy and collect a special county tax not exceeding four mills on each dollar of taxable property in the county, after the tax has been authorized by a majority vote of the qualified electors of the county, for the purpose of acquiring, constructing, operating, equipping or maintaining county hospitals or hospital facilities. This amendment shall not apply to Mobile, Montgomery or Jefferson Counties.

"QUESTION:

"In calling an election by the voters in the County for the purpose of levying the tax described in said Amendment, does the old law provide for calling special elections of this nature govern or will an enabling act be required before an election can be called?"

In answer to your request, you are advised that the general law providing for calling special elections for the purpose of levying a special tax does not of necessity apply to Act No. 357, General Acts 1947, page 241, neither is it necessary for the legislature to pass an enabling act before an election can be called under this act. Act No. 357, supra, which authorizes the levying and collecting of a special tax by the governing body of the several counties for the purpose of acquiring, constructing, operating, equipping and maintaining county hospitals, provides, in pertinent part, as follows:

"An election may be called at any time by the governing body of the county, and must be called within three months of receipt of a petition, signed by not less than five per cent of the qualified electors of the county, requesting that the election be called. The election shall be conducted in the manner which the governing body of the county prescribes."

It is to be noted that the act itself authorizes the county governing body to prescribe the manner of holding elections thereunder. The language used in this act is broad enough to authorize the county governing body of the counties affected thereby to prescribe any manner that they see fit to hold an election under this act.

It, therefore, appears that no enabling act is required before an election is called under Act No. 357, supra. I suggest that your county governing body by Resolution adopt any method which they see fit for holding elections under this act. Act No. 357, supra, is now a part of the Constitution of Alabama since this amendment was adopted on November 2, last.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 26, 1949.

Hon. F. G. Nunnelley, Chairman,
County Commission,
Calhoun County,
Anniston, Alabama.

Taxation—Exemption—Factories.

A plant used in the manufacture of soil pipe is not qualified for the tax exemption provided for by Title 51, Section 3, Code of Alabama 1940.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of October 11, 1948, is as follows:

"Jacksonville Soil Pipe and Foundry Company has filed a petition with the County Commission asking for exemption from taxation and stating that they will begin manufacturing soil pipe on or about November 1, 1948.

"Although we note that manufacturers of soil pipe are not specifically mentioned in Title 51, Section 3, they call our attention to the following provision of Section 3:

" 'or any other manufactured products.' "

"We will appreciate very much your official opinion as to whether under these circumstances they are entitled to the exemption."

I am of the opinion that a plant manufacturing soil pipe is not qualified for the tax exemption as provided for by Title 51, Section 3, Code of Alabama 1940.

Title 51, Section 3, supra, lists specific classes of factories and plants which are qualified for certain exemptions from the payment of ad

valorem taxes. Plants used in the manufacture of soil pipe are not listed with any of the enumerated classes of exempted factories or plants.

Since the Courts have many times held that exemptions are strictly construed against the taxpayer, it is my conclusion that a plant used in the manufacture of soil pipe is not qualified for said exemption, as there is no mention in Title 51, Section 3, *supra*, of such industry.

In deciding this question I am not unmindful of the contention that is often made that the expression "or any other manufactured products" as used in Section 3 extends the exemption to classes of factories other than those specifically designated.

The doctrine of "ejusdem generis" requires that where particular classes of things are followed by general words, the general words are presumed to describe the particular classes previously enumerated. If the Legislature had intended the general expression "or any other manufactured products" to include products other than the classes previously enumerated, it would have been unnecessary and uncalled for to have enumerated the various particular types of factories that are therein set forth. *Johnson v. State*, 32 Ala. 583. Therefore, the expression "or any other manufactured products" means any other manufactured products of the kinds and nature previously enumerated in Title 51, Section 3, *supra*. See Quarterly Report of Attorney General, Vol. 51, page 225.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 27, 1949.

Hon. Bradley Brown,
License Inspector,
Jefferson County,
418 Court House,
Birmingham 3, Alabama.

Motor Vehicles—License Tags—Automobile Dealers.

1. The use of demonstration tags, or so-called "dealer plates," on a wrecker or service truck though operated by a general automobile agency as an adjunct to its Service Department, is not lawful.

2. Use of such demonstration tags being confined to the commercial activity of displaying, demonstrating, transporting and testing new and used passenger cars and trucks, and other uses incident to conducting a general automobile agency, any dealer, salesman, or other person who uses such tags for other and private purposes, during day or night, does so without authority of law.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of January 7, 1949, is as follows:

"This office is having considerable difficulty in determining who is eligible for the use of dealer license plates on motor vehicles. Several of the licensed dealers in this county are using dealer plates on their service trucks and wreckers. Also, in many instances, members of the family of an automobile dealer are using dealer plates. As we are receiving complaints on this almost daily, I would appreciate your official opinion on the following:

"1. Is it permissible under the Revenue Law for a licensed dealer to use dealer plates on his wrecker or his service truck?

"2. Is it permissible for dealer plates to be used by the wife of a dealer or a member of a dealer's family?

"As we have had several calls from dealers who have bought the proper license for their service trucks and wreckers, and for cars belonging to members of their families, insisting that we make other dealers, who are using dealer plates, buy the proper tags, I would appreciate your advising me at your earliest convenience."

Automobile dealers are, by Title 51, Section 462, Code of Alabama 1940, required to be licensed as such. Section 464 of the same Title, after providing that a dealer shall be permitted to procure, at a cost of one dollar per tag, one demonstration tag for each salesman in his employ, provides:

"Such dealer tags may be used for displaying, demonstrating, transporting and testing new and used passenger cars and trucks, and such other uses incident to conducting a general automobile agency. Such tags may be used at any time, day or night, and any prospective purchaser may make demonstrations to his own satisfaction without the automobile dealer's representative being in attendance."

Therefore, we must look to the meaning of the phrase, "and such other uses incident to conducting a general automobile agency." In my judgment, it cannot reasonably be said that the operation of a wrecker is incidental to conducting a general automobile agency, the ordinary business of which is the sale and exchange of new and used cars. The operation of a wrecker is more commonly the function of a garage or fender and body repair shop, which may or may not be operated in conjunction with a general automobile agency. The operation of a service truck is more commonly the function of a garage or gasoline service station. Wreckers and service trucks operated by a garage, repair shop, or other business catering to the repair and maintenance of motor vehicles

clearly would not, by virtue of that fact alone, be entitled to use of demonstration tags. Some general automobile agencies operate wreckers and service trucks, and some do not. Hence, in my judgment it cannot be said, as a matter of law, that wrecker and truck service are essentially subordinate and subsidiary features of the operation of a general automobile agency. Ordinarily such vehicles are not on demonstration and are not offered for sale. Such service is more properly classified as a part of the Dealer's Service Department, and not part of his Sales Department. Demonstration tags are an exception to the general requirement of Title 36, Section 706, Code of Alabama 1940, that "the tag follows the car." The obvious intent of Section 464, *supra*, is to enable automobile dealers temporarily to license and demonstrate new and used cars being offered for sale, thus avoiding the financial hardship of affixing to such cars a regular and permanent license tag. Thus, in my judgment, the statute intends that demonstration tags be used by a Dealer's Sales Department as a temporary expedient, and not by his Service Department as a means of avoiding license taxation normally imposed upon operating motor vehicles. This office has previously held that a wrecker must be licensed either as a motor truck or as a private car, depending upon the category within which such wrecker falls. See Quarterly Report of the Attorney General, Vol. 22, page 202. I am therefore of the opinion that demonstration tags, or so-called "dealer plates," cannot lawfully be used on wreckers and service trucks, or either, operated by a general automobile agency. Hence, your first question is answered in the negative.

Nothing in Section 464, *supra*, contemplates the use of demonstration tags by a dealer's salesman, employee, or other person for private purpose or advantage. That section limits the use of such tags to the commercial routine of displaying, demonstrating, transporting and testing new and used passenger cars and trucks, and to such other uses "incident to conducting a general automobile agency." While they may be used for such purposes at any hour of day or night, and by any prospective purchaser engaged in self-demonstration, in my judgment such tags cannot lawfully be used, during day or night, by any person who is not displaying, demonstrating, transporting or testing new or used passenger cars or trucks, or otherwise engaged in an activity which may reasonably be considered as incidental to conducting a general automobile agency. This office has previously held that demonstration tags can lawfully be used only on passenger cars and trucks used for demonstration purposes, and if a salesman or other person uses such demonstration tags for private purposes he uses the same without authority of law. See Opinions of the Attorney General, Office Edition, January-February 1932, Vol. 8, page 79. The same result applies *a fortiori* to the wife or other member of a dealer's family. Hence your second question is answered in the negative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 31, 1949.

Hon. Roy E. Blair,
Tax Assessor,
Madison County,
Huntsville, Alabama.

Taxes—Assessment—Ad valorem—Title 51, Sections 2 and 48,
Code of Alabama 1940, Section 91, Constitution of 1901.

1. For ad valorem tax purposes, property subject to said tax should be listed and assessed in the name of the owner thereof as of October 1, the beginning of the tax year.

2. To enjoy the right of exemption under the provisions of section 91 of the Constitution of 1901, or Title 51, Section 2, as amended, Code of Alabama 1940, the property must be subject to the exemption on the beginning of the tax year, that is, on October 1, when the obligation of the taxpayer arises.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of January 15, 1949, is as follows:

"This is in relation to a piece of property owned by Edwin W. and Carl T. Jones, Administrators for the Estate of G. Walter Jones.

"The house and lot in question were sold on contract to the City of Huntsville by the Jones family. The property was Mrs. G. W. Jones' during her lifetime. She died last fall, and I understand that a period of six months must pass before legal action can be taken. I should like to know what procedure I should take in assessing this property in view of the fact that on March 5, 1949, it will be deeded to the City of Huntsville.

"I shall appreciate it if you will give us an answer at your earliest convenience, because we are getting our assessments worked up, and we will soon be working on an abstract for next year."

The property in question should be listed and assessed in the name of the owner thereof as of October 1, 1948 and if the property is property which was owned by a deceased person who died prior to October 1, 1948, the property should be listed as provided in Title 51, Section 48, Code of Alabama 1940 as follows:

'Section 48. By Whom Property Should be Listed.—The property
* * * of every minor shall be listed by his guardian, if he has one;
* * * of every deceased person, by the executor or administrator
but if there be no executor or administrator, by any person having

an interest in the estate of said decedent by request, or devise or under the laws of descent and distribution; * * * in the name of the owner thereof."

The property in question will not be exempt from ad valorem taxes until October 1, 1949, assuming, of course, that the City of Huntsville owns said property on that date. To enjoy the right of exemption under the provisions of Section 91 of the Constitution of 1901, or Title 51, Section 2, as amended, Code of Alabama 1940, the property must be subject to the exemption on the beginning of the tax year (October 1), when the obligation of the taxpayer arises. **State Tax Commission v. Commercial Realty Company**, 236 Ala. 358, 182 So. 31.

The fact that the property will be deeded to the City of Huntsville on March 5, 1949 in no way affects the assessments for the tax year October 1, 1948 - September 30, 1949. If the City of Huntsville still owns this property on October 1, 1949, said property will be exempt from ad valorem taxes for the taxable year October 1, 1949 - September 30, 1950 and for each taxable year following so long as the city shall own said property.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 31, 1949.

Hon. James S. Saliba,
Brigadier General,
The Adjutant General,
State Military Department,
CAPITOL.

Taxation—Real Estate—Assessments—Armory Commission—
Adjutant General—Municipalities.

1. Real estate owned by the State of Alabama, or by any department or agency thereof, and devoted to strictly public uses, is not subject to special assessments for public improvements made by a municipality.

2. Lots Nos. 7 and 8, Block 21, South Smithfield, Jefferson County, Alabama, title to which is in the State of Alabama, may be sold by the Governor and the proceeds of such sale delivered over to the Armory Commission of Alabama for the purpose of enlarging existing armory facilities of Jefferson County, pursuant to the terms of Act No. 492, General Acts 1927, page 565.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion dated November 1, 1948, is as follows:

"On 29 September 1925, lots 7 and 8 in Block 21, South Smithfield, Jefferson County, Alabama, were unconditionally conveyed by quit-claim deed to the State of Alabama by the Battery 'D' Armory Company, a corporation. Attached is this deed, together with an Abstract of Title covering these lots which has been brought down to the 22nd day of October 1948. It is requested that receipt of this deed and abstract be acknowledged.

"So far as is known to this Department and as is shown by the Abstract, there have been no instruments executed or recorded affecting the title to this property since the execution of the above mentioned deed. The City of Birmingham has recently paved the streets abutting these lots, and has made street improvement assessments against them in the amount of \$352.21 and \$536.68, respectively. The City of Birmingham has been seeking to collect these assessments from the Armory Commission of Alabama, which the City believed to be the owner of the lots, whereas it appears that the Armory Commission at present may have no proprietary interest in the property. In view of the history of this property, however, it appears that it should be transferred to the Armory Commission of Alabama.

"Your opinion is requested as to whether the State of Alabama or the Armory Commission of Alabama is the owner of this property and, further, whether the State of Alabama or the Armory Commission of Alabama is obligated to pay the aforesaid street improvement assessments to the City of Birmingham, or whether such property is exempted from such assessment by reason of its public ownership.

"It is also requested that you advise what agency or officials of the State are empowered to convey this property by deed or transfer to the Armory Commission of Alabama. It will also be appreciated if you, as the legal member of the Armory Commission of Alabama, will prepare a proper instrument for the conveyance or transfer of this property to the Armory Commission and furnish same to me in order that I may seek to obtain its execution by the proper authorities of the State.

"Your opinion is further requested as to whether, if this property is hereafter conveyed or transferred by the State of Alabama to the Armory Commission of Alabama, the property will be received free of incumbrances as pertains to these assessments.

"Attention is invited to page 28 of the attached abstract, which quotes an Act of the Legislature approved September 9, 1927 (General

Acts of Alabama, 1927, page 565). In addition to authorizing and empowering the Governor to sell these properties, the Act provides that the proceeds of the sale 'shall be delivered to the proper representatives of the National Guard Units, of Jefferson County for the sole purpose of the purchase or erection of an Armory Building for said National Guard Units of Jefferson County, Alabama, and the said proceeds of said sale shall not be delivered to said National Guard Units until a bona fide contract for the erection of an Armory Building has been entered into.'

"A large armory building for National Guard units stationed in Birmingham has already been constructed and paid for and these lots have not yet been sold under the provisions of this Act. On the other hand, there is an urgent need for expansion of the Birmingham armory facilities, and as soon as sufficient funds are available such construction will be undertaken. It is anticipated that the greater portion of such costs will be borne by the Federal government, but it will no doubt be necessary for the Armory Commission to pay a portion thereof. It is noted that the 1927 Act provides a simpler procedure for selling this property than is provided in Chapter 2, Title 35, Code of Alabama 1940. Under these circumstances, your opinion is requested as to whether the following actions are possible and legal: sale of this property by the Governor under the authority and in the manner described by the 1927 Act, followed by a transfer of the proceeds of such sale to the Armory Commission of Alabama, under the provisions of Section 190, Title 35, Code of Alabama 1940, upon the theory that the dedication of the proceeds of such sale by the 1927 Act constituted an appropriation for the benefit of the units of the State Militia and are therefore subject to transfer to the Armory Commission under the terms of said Section 190. If this procedure is possible, the mechanics of the sale will be much simpler, formal transfer of the property to the Armory Commission will be unnecessary, and the proceeds of the sale can still be preserved for the use of the Armory Commission in financing future armory construction and expansion.

"Your early advice in the above matters will be appreciated, in order that proper disposal may be made of the assessment claims by the City of Birmingham and in order that a decision may be made as to the future handling of these properties."

While municipalities generally, by virtue of Title 37, Section 524, Code of Alabama 1940, are empowered to levy special assessments against abutting property for public improvements, to the extent of the increased value of such property by reason of the special benefits derived from such improvements, yet the general language of Section 524, supra, in the absence of more specific authority, is insufficient to empower municipalities to assess State or County property devoted to strictly public uses. *City of Huntsville v. Madison County*, 166 Ala. 389, 52 So. 326.

The City of Birmingham, however, stands in a unique position with respect to special public improvement assessments against county prop-

erty, for street and sewer improvements, by virtue by Section 18 of Act No. 257, General Acts 1915, page 294, codified in Title 62, Section 664. Code of Alabama 1940. The Supreme Court having held in *City of Huntsville v. Madison County*, supra, that county property was not subject to such special assessments, Section 18, supra, presumably was enacted to make the properties of Jefferson County liable to such special assessments by the City of Birmingham. Such liability was thereafter upheld by the Supreme Court in *Jefferson County v. City of Birmingham*, 235 Ala. 199, 178 So. 226.

It will be noted that Act No. 257, supra, does not remove State property, or property owned by any department or agency thereof, from its normal category of exempt property. Therefore, since the lots in question are owned by the State of Alabama, being devoted to strictly public use, I am of the opinion that the City of Birmingham has no lawful authority to levy against them a special assessment for street improvements.

Lack of authority in the municipality to levy such special assessment against property owned by the State of Alabama would not, however, preclude the State, if it so determined, from voluntarily contributing to the cost of such public improvements, provided such contribution be based upon the increased value of the property by reason of the special benefits derived from such improvements. See *Town of Eutaw v. Coleman*, 189 Ala. 164, 66 So. 646; Quarterly Report of the Attorney General, Vol. 14, page 19, and Vol. 19, page 229; Opinion to Hon. B. L. Balch, Superintendent of Education, Macon County, under date of December 9, 1948.

The abstract of title shows that these lots on September 29, 1925, were quitclaimed by the Battery "D" Armory Company to the State of Alabama. In explanation of your written request you advise verbally that the Battery "D" Armory Company, a corporation, became dormant and inactive shortly after the close of World War I, its quitclaim deed being executed by its President, Mr. E. D. Smith, in order that title might rest in the State of Alabama rather than in a defunct military unit. The deed itself does not recite the purpose of this conveyance nor reserve unto the grantor any trust interest. By virtue of Title 47, Section 14, Code of Alabama 1940, the conveyance operated as an outright gift to the State. Act No. 492, General Acts 1927, page 565, remains, however, in full force and effect even though not brought forward into the 1940 Code. Not being of a general and permanent nature, its omission in no wise affects its present validity. Title 1, Section 9, Code of Alabama 1940.

Act No. 492, supra, empowers the Governor to sell and convey these lots, the proceeds to be delivered over to the National Guard Units of Jefferson County solely for the purpose of armory purchase or erection, said proceeds not to be delivered over by the Governor until a bona fide contract for the erection of an Armory Building has been entered into. You advise me that an Armory Building has been contracted for and erected, but that these lots have never been sold pursuant to the terms

and conditions of Act No. 492, supra. You further advise that the Armory Commission of Alabama, which is the state agency having supervision and control of all new armory construction, now wishes to sell these lots and devote the proceeds to the cost of enlargement of existing armory facilities of Jefferson County. See Section 4 of Act No. 276, General Acts 1935, page 672.

Since in my judgment no legal distinction exists between original armory construction and enlargement of existing armory facilities, I am of the opinion that these lots now may be sold by the Governor, in the manner provided by and pursuant to the terms of Act No. 462, supra, and that the proceeds of such sale lawfully may be delivered over to the Armory Commission of Alabama, to be used solely for the purpose of enlarging existing armory facilities of Jefferson County. This conclusion having been reached, your other questions require no answer. The deed and abstract submitted with your request are returned herewith.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 1, 1949.

Hon. A. P. Wilson, Clerk,
Town of Hodges,
Franklin County,
Hodges, Alabama.

Municipal Corporations—Towns—

In disbursing the funds of the Town of Hodges, a town with a population of less than six thousand inhabitants, warrants should be drawn by the clerk, and approved by the mayor and presented to the treasurer for payment. Not necessary to have vote of council to validate such disbursement.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of January 18, 1949, is as follows:

"Would you kindly advise me as to the correct procedure of a town council in regard to the payment of money belonging to the town and in custody of the town treasurer in the settlement of salaries, claims, or any indebtedness of the town.

"I think that all payments of the town's funds should be sanctioned by at least a two thirds vote of the council and unless so

sanctioned warrants cannot be legally drawn upon the treasurer and he cannot legally pay any warrants that are not approved by at least a two-thirds majority of the council.

"The mayor of this place says the above is not at all necessary, that no vote of the council is required to pay out the moneys in the town treasury. He appointed a committee of two members of the board of aldermen and contends that when one of this committee (Finance Committee) puts his initials on a warrant drawn on the treasurer it is validated and legalized without a vote of the council.

"Now, I think we may both be wrong but of course we cannot both be right. Will you kindly advise which, if either, is right?"

According to the 1940 census, the population of your town was under six thousand.

In disbursing the town's funds, it is my opinion you should adopt the following procedure. The warrant should be drawn by the clerk and approved by the mayor and presented to the treasurer for payment. Title 37, Section 446, Code of Alabama 1940, provides as follows:

"The treasurer shall give bond in such sum as the council may prescribe, for the faithful performance of his duties and the safe custody of the funds. He shall be the custodian of the funds of the municipality, keeping an accurate record of the funds of the several departments, and shall keep books showing accurately the financial condition of the city. He shall pay out money only upon warrants drawn by the officers authorized herein to draw warrants upon the treasurer, and when paid shall keep safely the warrants so drawn. Such warrants shall be drawn by the clerk, approved by the mayor, except as herein otherwise provided, on the treasurer, the warrant showing to what department the same is to be charged.

"In cities of six thousand or more, such warrants shall be drawn by the clerk on the treasurer, the warrants showing to what department the same is to be charged, but the council may authorize the clerk to draw such warrants on the treasurer without the approval of the mayor, except that in all instances, the approval of the mayor shall have first been inscribed upon delegated to another officer or person. So where a charter prescribes that designated officers 'shall authenticate all special tax bills,' such duty requires the exercise of judgment and discretion, and cannot be performed by others."

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 2, 1949.

Hon. I. F. Simmons,
Superintendent,
County Board of Education,
Jefferson County,
Birmingham 3, Alabama.

Municipal Corporation—Taxation.

The money derived from a tax levy by a municipal corporation under the authority of Title 37, Section 700, Code of Alabama 1940, may not be turned over to the county board of education to be expended by the county board of education in constructing school buildings.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of November 19, 1948, is as follows:

"Attached is copy of an ordinance of the town of Brookside, Alabama, levying an additional ad valorem tax of one and one-half per cent on the value of the taxable property in said town for school purposes, and providing that the proceeds of said tax shall be appropriated by the town council to the Jefferson County Board of Education to be used by said County Board of Education to defray the cost of erecting school building to serve the residents of the town. Please promptly advise this office (1) whether in your opinion the ordinance is valid, (2) whether the pledge and appropriation of the proceeds of this tax to the Jefferson County Board of Education is legal and binding on future councils, and (3) whether warrants may be issued and sold by the County Board of Education relying upon said pledge from the town of Brookside, Alabama.

"Since this problem involves a tax and the construction program of our Board we would appreciate your prompt response to this inquiry."

In reply to your first inquiry, you are advised that in my opinion Ordinance No. 1B, adopted by the governing body of the City of Brookside, Alabama, is invalid.

It appears from the context of this ordinance that its sole purpose is to levy a tax of one-half of one per cent on the taxable property within the corporate limits of said town, the proceeds from said tax to be turned over to the Board of Education of Jefferson County, and said board is to use this money in constructing school buildings either within or without the corporate limits of the town of Brookside.

It appears that the said ordinance was passed and adopted under the authority granted to municipal corporations by Title 37, Section 700, Code of Alabama 1940. This section authorizes municipal corporations to levy a tax on the property situated within the corporate limits of such municipality for city purposes. It was undoubtedly the Legislature's intent when this code section was enacted that the proceeds from the taxes thereunder levied should be used by the city for city purposes. It is likewise true that the Legislature contemplated that the revenue derived from this source of taxation should be spent by the city and the funds should remain under the control and supervision of the city governing body.

The question now presents itself as to what nature city funds take when such funds are turned over to a county board of education.

The Supreme Court in the case of *City Board of Education of Athens, et al. v. Williams, Superintendent of Banks, et al.*, 231 Ala. 137, 163 So. 802, held that where a city makes an appropriation for school purposes, and turns its money over to the treasurer of school funds, then such funds no longer are a part of the city's funds, but at once become as other funds in the possession of the treasurer of the school board. All such money is then held by it (the school board) for the State's system of schools, regardless of its source to be expended by the school board as other money in its possession. See also the case of *State, et al. v. Williams, Superintendent of Banks, et al.*, 236 Ala. 272, 181 So. 792.

Therefore, since the funds derived by the levy of this tax under Ordinance 1B, when they are turned over to the County Board of Education of Jefferson County cease to be city funds, it is my opinion that a municipal corporation may not adopt such an ordinance under the provisions of Title 37, Section 700, Code of Alabama 1940. This for the reason that this code section only authorizes municipal corporations to levy a tax for city purposes, the proceeds of such tax to be at all times under the control of and expended by the governing body of the city.

What I have said hereinabove only applies to Ordinance 1B in its present form. The above ruling in no way mitigates against a municipal corporation adopting an ordinance under the provisions of Section 700, *supra*, and imposing a tax on the property situated within the city for school purposes. The ruling hereinabove set forth is to the effect that a municipal corporation under an ordinance adopted under Section 700, *supra*, may not turn its money over to a county board of education or any other state agency. I deem it advisable to point out that I see no legal objection to the town of Brookside adopting an ordinance levying a tax under the provisions of this code section for school purposes in so long as the governing body of the town has control and supervision of the expending of the money derived from said tax. If the town of Brookside desires to enter into an agreement with the county board of education whereby the town will expend so much money for the purpose of building a school and the county board of education will expend so much money, I see no reason why the money derived from a tax

levied under the provisions of Section 700, supra, could not be used for this purpose. The only limitation being that the governing body of the town must expend the money itself.

I would, therefore, suggest that an agreement be entered into by and between the town of Brookside and the County Board of Education of Jefferson County, whereby the County Board will contract for the construction of a school building, and the town of Brookside periodically pay its appropriate part of the construction of this school.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 2, 1949.

Hon. J. D. Mitchell, Director,
Department of Public Safety,
CAPITOL.

Public Safety Department—Highway Patrol—Motor Carriers
—Trucks—Arrests—Bail.

1. Since the exemption allowed by Title 36, Section 92, Code of Alabama 1940, to trucks and semi-trailer trucks transporting milk or other perishable food for human consumption, applies only to weight, such motor vehicles must conform to the width (8'), height (12'-6"), and length (35'-45') limitations of Title 36, Section 89, Code of Alabama 1940, as amended. operation of such vehicles exceeding such limitations being a violation of law.

2. Where the driver of a truck or semi-trailer truck, transporting milk or other perishable food for human consumption, is arrested and jailed, due to inability to furnish bail-bond, pays his fine, or otherwise, the law imposes upon the arresting officer no legal liability to preserve the perishable load.

3. By virtue of Title 36, Section 72, Code of Alabama 1940, the Director of Public Safety, with approval of the Governor, has the duty of promulgating reasonable rules and regulations, which may be adopted to control a highway patrolman's conduct and procedure relative to preservation of the load, when making an arrest for violation of the width, height, and length laws by a truck transporting milk or other perishable food for human consumption.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of January 13, 1949, is as follows:

"Title 36, Section 92, Code of Alabama, sets out certain conditions under which the operation of a motor truck is exempt with respect to our weight laws but is silent as to exemptions on over-length, overheight and overwidth.

"Truckers are constantly moving perishable produce from the State of Florida through Alabama to northern markets. Some of these trucks do not conform to our laws particularly as to length. The question has arisen, since the law is silent on exemptions as to length, height, and width of trucks bearing the perishable produce, just what steps a Highway Patrolman may take in making them conform to our laws. It is obvious, that should a patrolman find one of them oversize in any way, he would not allow the driver to sign his own bond as he is an out-of-state resident and could not be brought back to court. Yet, if the driver refuses or fails to pay his fine and elects to go to jail instead there is the question of the perishable load and who is responsible for it if it spoils or rots while the driver is being held. We are requesting an opinion which will clarify this situation so that the Highway Patrolmen will know what procedure to follow in cases of this nature in order to avoid being held responsible for loss or damage to perishable cargo."

Title 36, Section 89, Code of Alabama 1940, as amended by Act No. 179, General Acts 1943, page 159, provides that it shall be unlawful for any person to drive or move on any highway in this state any vehicle or vehicles of a size or weight except in accordance with specified limitations as to width, height, length, and weight.

Title 36, Section 92, Code of Alabama 1940, provides as follows:

"There shall be exempt from the provisions of this article as to weight, any motor truck or semi-trailer truck transporting milk or other perishable food for human consumption, for which refrigeration in transit is reasonably necessary in the interest of public health, when moving under refrigeration in refrigerated containers, insulated containers or in thermos containers, to or from market from the territory in which such commodity is collected or concentrated."

Thus, the exemption afforded by Section 92, *supra*, covers weight only, and then only if the truck or semi-trailer truck is transporting milk or other perishable food for human consumption, in refrigerated, insulated, or thermos containers. Hence any such vehicle which exceeds the legal width (8'), legal height (12'-6"), or legal length (35'-45"), as defined by Act No. 179, *supra*, is operating in violation of law. It seems likely that highway safety factors precluded the Legislature from extending the exemption beyond the single exemption as to weight.

Title 36, Section 83, Code of Alabama 1940, prescribes the penalty for operation of any motor truck, semi-trailer truck or trailer in violation of any section of Chapter 3 of which Sections 89 and 92, *supra*, are a part. It provides that such operation shall constitute a mis-

ATTORNEY GENERAL OF ALABAMA

demeanor, applicable to both the operator and the owner of the vehicle, punishable by minimum fine of one hundred dollars and maximum fine of five hundred dollars, and by imprisonment or sentence to hard labor for the county for not less than thirty days nor more than sixty days.

Title 36, Section 86, Code of Alabama 1940, after providing that any peace officer is authorized and has the duty of making arrests for any violation of Chapter 3 without warrant, if the offense be committed in his presence, provides in part that:

“ . . . If the arrest be made without warrant, the accused may elect to be immediately taken before the nearest court having jurisdiction whereupon it shall be the duty of the officer to so take him. If the accused elect not to be so taken, then it shall be the duty of the officer to require of the accused a bail-bond in a sum not to exceed three hundred dollars, conditioned that the accused binds himself to appear in the nearest court having jurisdiction at the time fixed in the bond. In case the arrested person fails to appear on the day fixed, the bond shall be forfeited in the manner as is provided for the forfeiture of bonds in other cases. No officer shall be permitted to take a cash bond. The officer making the arrest and taking the bond shall report the same to the court having jurisdiction within eighteen hours after taking such bond.”

Title 15, Sections 199 and 200, Code of Alabama 1940, prescribes the form of bail, both in open court and not in open court, from which it will be noted that two sufficient sureties are required, or in lieu thereof, as provided by Section 201 of that Title, bail may be executed by a corporation, foreign or domestic, qualified to do a bonding business in this state.

You state that: “It is obvious, that should a patrolman find one of them oversize in any way, he would not allow the driver to sign his own bond as he is an out-of-state resident and could not be brought back to court.” In my judgment, the situation which you describe presents no special difficulty. The highway patrolman, or other arresting officer, has no discretion in the matter of releasing the offender upon his own recognizance or merely under written bond approval by the arresting officer. That relatively simple procedure applies only to arrests for violation of the Rules of the Road, as defined in Chapter 1 of Title 36, whereas your question applies to violation of the Regulations as to Size and Weight as defined in Chapter 3 of Title 36. For violation of the second class, Section 86, *supra*, requires that the accused furnish a bail-bond, which in my opinion means a bail-bond with sureties, as defined by Sections 199, 200, and 201, *supra*. Remote indeed is the likelihood that an out-of-state truck driver, arrested for violation of the width, height, and length limitations and required to furnish in the penal sum of \$300.00 a bail-bond upon which a licensed bonding corporation is surety, would skip bail.

Nor can I find in the law any responsibility upon the constituted peace officers, and other law-enforcement agencies, for preservation of a perishable load of foodstuffs being hauled in violation of the aforesaid width, height, and length limitations. That concern is one which addresses itself to the sound judgment and action of the owner and driver of the truck or load. The consequential damages to these suffering the penalties of offended law frequently are more severe than the penalties themselves. In my opinion the arresting officer is no more responsible for preservation of the perishable load than a sheriff, who having arrested a citizen for wife-beating, is responsible for milking the citizen's cow or feeding his children. Such is not the law.

Strict legal liability should not be confused, however, with an individual responsibility which the Department of Public Safety may, by appropriate rules and regulations, place upon its highway patrolmen. Title 36, Section 72, Code of Alabama 1940, imposes upon the Director of Public Safety, with the approval of the Governor, the duty of establishing and promulgating reasonable rules and regulations concerning operation of motor vehicles.

Therefore, as a matter of administrative policy you may wish to promulgate, for future guidance of your officers, an appropriate set of rules and regulations covering the situation where your patrolmen arrest drivers of trucks or semi-trailer trucks transporting milk or other perishable food for human consumption. Only a sane and sensible enforcement of these width, height, and length limitations can make effective the existing reciprocity agreement between Florida and Alabama and prevent retaliatory measures by Florida against our own citizens.

Anticipating your need for such rules and regulations, I have drawn and set forth hereinafter, a skeleton draft of rules and regulations which, in my judgment, can be expected to cover many situations which may arise. They are merely suggestive, and are submitted, subject to your appropriate revision, only for assistance in solving your particular problem.

I suggest that rules and regulations, bearing approval by the Governor, substantially as follows, be adopted:

RULE. 7. REQUIRING HIGHWAY PATROLMEN TO TAKE PRECAUTIONARY MEASURES FOR PROTECTION OF THE LOAD, WHEN ARRESTING DRIVERS OF TRUCKS TRANSPORTING MILK OR OTHER PERISHABLE FOOD FOR HUMAN CONSUMPTION.

(a) In case of arrest of a driver hauling fresh vegetables or produce, fresh fish, fresh meats, milk, or any other perishable food for human consumption which requires constant refrigeration, the highway patrolman is charged with the duty of permitting the driver of such vehicle to protect the lading thereof, by allowing the driver to operate any mechanical device which is attached to the vehicle for refrigeration, until the driver has been able to contact his employer or make lawful bail-bond.

(b) In the case where the vehicle is not provided with such mechanical device, but instead depends upon dry ice for refrigeration, the highway patrolman shall permit the vehicle to proceed, under his custody, to a point where dry ice is available, and shall aid the driver in securing a supply of dry ice, at the cost of the owner of the vehicle, in order to protect the load.

(c) In the case where the vehicle is refrigerated with natural or manufactured ice, the driver shall be permitted to replenish the supply of ice in a quantity sufficient properly to protect the load.

(d) In the case where the vehicle is moving under so-called "ventilation" for protection of the lading, such ventilation being created by movement of the vehicle, it shall be the duty of the highway patrolman to permit the driver to secure fans, or other mechanical devices, and place them in the vents of the vehicle, in order that circulation of fresh air within the vehicle shall be constant; and such vehicle shall be placed in the shade, or in a cool building, while the driver is in custody and awaiting execution of bail-bond or trial.

(e) In unusual cases which require the application of precautionary measures other than the above, the highway patrolman shall consult with the driver of the vehicle and shall permit the driver to use such means as may be necessary to protect the lading of the vehicle while the driver is in custody.

(f) Upon conviction and assessment of a fine, if the driver of the vehicle is unable to pay the fine he shall be permitted to contact his employer, by telephone or telegraph, and shall be aided in effecting such contact; the driver shall be afforded a reasonable time in which to secure the transfer of money sufficient to pay such fine and cost.

(g) If, upon the driver effecting such contact with his employer or owner of the vehicle, said employer or owner refuses to supply the driver, by telegraph or otherwise, with monies sufficient to pay such fine and costs, responsibility of the Department of Public Safety for protection of the load ceases, and the driver should be jailed.

(h) In all cases the highway patrolman shall use all means within his power to arrange for a prompt and speedy trial of the accused, in order that he may proceed on his journey and avoid spoilage of the lading. Upon arrest courts of competent jurisdiction should be consulted forthwith, if possible, with a view to immediate trial at unusual hours, in order to facilitate speedy disposition of the charge and transfer of money by telegraph when a fine is imposed and bail-bond is impossible to make.

(i) Upon failure of application of the above rules by reason of the inability of the driver to secure bail-bond or to pay the fine and costs, it shall be the duty of the highway patrolman to

cause the perishable load of the vehicle to be placed in public refrigeration, costs thereof to be assessed against the owner of the vehicle or against the lading itself.

(j) In making arrests for violation of the width, height, and length laws the highway patrolman shall exercise due caution and sound judgment. It is not this Department's policy to make arrests for trivial and inadvertent infractions of these Size Laws; the patrolman should bear in mind that the purpose of these laws is to promote and safeguard highway safety. Trivial violations which do not jeopardize highway safety frequently can be corrected by an appropriate warning, rather than by arrest. Injudicious arrests for trivial violations might easily result in retaliation by sister states against citizens of our own state when on out-of-state journeys.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 7, 1949.

Hon. Howard Kirby,
Clerk, Circuit Court,
Etowah County,
Gadsden, Alabama.

Etowah County—Inferior Courts—Clerks.

Clerk of County Court of Etowah County is not required to make a "final record" of proceedings in said court.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of December 31, 1948, is as follows:

"Please refer to the Local Acts of the Legislature of Alabama, Regular Session of 1947, pages 390 to 394, inclusive, and render to me your opinion on the following matters regarding the County Court of Etowah County which was created by Act of said Legislature. Said Court to begin operation on the first Monday after the Second Tuesday in January of 1949.

"According to my understanding said Court will not be a Court of Record since appeals will go to Circuit Court, triable De Novo, and not directly to Court of Appeals.

"In your opinion is the County Court of Etowah County, created by the Act referred to above, a Court of Record? If not a Court of

Record is there any legal requirement that I as Ex-Officio Clerk of said Court make Final Record of Proceedings in each case as is required in Circuit Court?"

An answer to the question of whether or not a court is or is not a "court of record" is not decisive of the ultimate question propounded by your inquiry, namely, whether or not the clerk of the County Court of Etowah County (Act No. 578, Local Acts 1947, p. 390) must make a final record of the proceedings in said court. Our Supreme Court has said that a court may be a "court of record" for one purpose or within the meaning of some laws, while the same court may not be a "court of record" for other purposes. Cf. *Vandiver v. Burke*, 175 Ala. 561, 57 So. 870; *Cook v. Burke*, 177 Ala. 155, 58 So. 984; *England v. State*, 240 Ala. 76, 197 So. 365.

It has been held that the following courts are courts of record: The Supreme Court, *Naro v. State*, 212 Ala. 5, 101 So. 666; probate courts, *Whitaker v. Kenamer*, 229 Ala. 80, 155 So. 855; the Intermediate Civil Court of Birmingham, *Aetna Auto Finance Co. v. Kirby*, 240 Ala. 228, 198 So. 356; Court of County Revenue of Franklin County, *Franklin County v. Richardson*, 202 Ala. 46, 79 So. 384. It has also been held that the following courts are not courts of record: Justices' courts or courts created in lieu of justices' courts under Section 168 of the Constitution of 1901, *Willett v. Weaver*, 205, Ala. 268, 87 So. 601, Quarterly Report of Attorney General, Vol. 22, p. 191.

A county court (Title 13, Sections 313, et seq., Code of Alabama 1940) is not a court of record. *England v. State*, supra; Quarterly Report of Attorney General, Vol. 33, page 48. Yet the clerk must prepare a final record. *Swindle v. Crocker*, 217 Ala. 199, 115 So. 252.

The conflicts in the holdings as to whether a court is or is not a court of record are probably explained by the fact that in each instance the court deciding such question is deciding it with reference to a particular statute or constitutional provision, e. g., Section 150, Constitution of 1901, Title 7, Section 584, Code of Alabama 1940.

There is no express provision of law in said Act No. 578, supra, requiring the clerk to keep a final record of the proceedings in said court. The local act does provide, however:

"Section 4. The circuit clerk of Etowah County, Alabama, shall be ex officio clerk of the county court of Etowah County, and all duties performed by or required of the said clerk shall be by virtue of his being clerk of the circuit court. The clerk shall issue processes of said court, keep a docket of the proceedings of said court both civil and criminal, certify all appeals and certioraries, shall have the power and authority to take affidavits and issue search warrants and warrants of arrest thereon, making same returnable to said county court. The fees and costs allowed by law in civil cases to justices of the peace, constables, sheriffs and witnesses for services

in the justice of the peace courts shall be taxed and collected as provided by law in each civil case. In all criminal cases the fees and costs authorized by law to be taxed in the county courts of the state shall be taxed and collected in each criminal case tried or docketed in said court. In addition thereto, there shall be taxed and collected for the use of the county in each case both civil and criminal docketed a trial fee of one dollar. The said clerk shall be entitled to receive and retain as his compensation in criminal cases, the same costs, fees and commissions allowed by law to clerks of the circuit court for like duties and services, and one half of all justice fees, other than the one dollar trial tax, collected in all civil cases. The fees accruing to sheriffs, constables, witnesses and justices of the peace, when collected, shall be paid direct to those entitled thereto, and all other fees and costs, except those the clerk is entitled to retain as his compensation, shall be paid monthly by the said clerk to the county treasurer. All fines, forfeitures and other monies collected by the clerk for the state of Alabama shall be paid monthly by the said clerk to the state treasurer. All fines and forfeitures collected for the county fine and forfeiture fund shall be paid into said fund monthly. The clerk shall have the right to appoint an assistant clerk at his own expense who shall be authorized to act in the name of the clerk and for whose acts the clerk shall be responsible."

"Section 9. The rules and regulations governing justices of the peace courts shall apply as near as possible in all civil cases and the rules and regulations governing county courts shall apply as near as possible in all criminal cases, except as herein otherwise provided. All parties against whom judgments have been rendered shall have ten days within which to effect appeals to the circuit court, such appeals to be perfected in the manner prescribed by law for appeals from justice of peace courts. In all civil cases the judge may, at his discretion, set aside judgments on motion of either party within five days after such judgment is granted. In civil cases when an execution has been issued within twelve months after the rendition of judgment and has not been returned satisfied, an alias execution may be issued thereon at any time within six years from date of such judgment without a revival of judgment. When a certificate of judgment has been filed in the office of the probate judge within twelve months from the date of its rendition, execution may issue thereon at any time within six years from the date of said judgment, whether execution has been previously issued or not, and such recorded judgment shall be a lien on the property of the defendant as provided by law in the circuit courts. Warrants may be issued by justices of the peace in said county returnable to said court for any indictable offense, and peace and bastardy proceedings and non-support cases."

I conclude from the foregoing sections that the clerk is required "to keep a docket of the proceedings of said court both civil and criminal, . . ." This requirement, of course, does not compel the clerk to

make a final record as this term is commonly understood. Title 13, Section 198, subsection 9, Code of Alabama 1940. The provision merely requires the clerk to keep a docket and note therein all matters relating to each proceeding. Cf. Title 13, Section 198, Code of Alabama 1940.

It is further provided in Section 9 of Act No. 578, supra, that all parties against whom judgments have been rendered may appeal within ten days to the circuit court. Such appeal is required to be perfected in the same manner as appeals from justices' courts. In my judgment, this means that the case on appeal must be tried de novo. Title 13, Sections 429-484, Code of Alabama 1940. It is my opinion, therefore, that no final record in the County Court of Etowah County is required. Quarterly Report of Attorney General, Vol. 23, page 238, 240.

I am aware of the holding in *Swindle v. Crocker*, 217 Ala. 199, 115 So. 252, stating that circuit clerks, who are ex officio clerks of county courts and entitled to the same fees in criminal cases as those allowed to circuit clerks, must make a final record. In my opinion, the holding in the *Swindle* case, supra, is applicable only to county courts created by the general law (Title 13, Section 313, et seq., Code of Alabama 1940), and should not in all cases be extended to inferior courts created by local law, such as the County Court of Etowah County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 7, 1949.

Hon. Frank A. Boswell, Director,
Department of Corrections and Institutions,
CAPITOL.

Solicitors—Fees—Costs and Fees.

1. A solicitor's fee is based on the offense for which the defendant was convicted.
2. Solicitors' fees discussed generally.
3. The fact that the conviction was obtained in either a wet or dry county does not affect the amount of the solicitors' fees legally payable from the convict fund.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion bearing date of January 12, 1948, is as follows:

"You are respectfully requested to advise me on solicitors fees on violations of the prohibition laws in which delivery of prisoner is made to the state.

"It is my understanding that a solicitors fee is based upon the offense for which the defendant is convicted and not for the offense charged.

"We receive cost bills frequently that indicate the offense as 'VPL' and some delay is experienced in determining whether the solicitors fee should be \$10.00 or \$30.00.

"It would be appreciated if you would discuss generally the solicitor fees legally payable from the convict fund as to the amount of such fee for each type of offense and make distinction if any between wet and dry counties."

In answer to your inquiry, you are advised that a solicitor's fee is based on the offense for which the defendant was convicted and not for the offense charged. Title 11, Section 85, Code of Alabama 1940; Biennial Report of Attorney General, 1934-36, page 61; Quarterly Report of Attorney General, Vol. 25, page 143.

For a general discussion of a solicitor's fees in connection with violations of the Prohibition Law, see Biennial Report of Attorney General, 1926-28, page 520, which says, in part, as follows:

"In my opinion the proper solicitor's fee to charge on conviction of an attempt to distill or manufacture prohibited liquors is \$10.00 and is governed by that part of the schedule in Section 3738 which reads as follows:

'For each conviction of a misdemeanor, not otherwise provided for—\$10.00.'

"Where one is convicted of keeping, selling or having in possession prohibited liquors unless there is some special provision otherwise, the following schedule governs:

'For each conviction of any law prohibiting the keeping, sale, or having in possession, spirituous, vinous, or malt liquors, not herein otherwise provided for—\$30.00.'

"The last above quoted schedule is a revision by the Code Committee, apparently. The older schedule, still a part of Section 3634 is as follows:

'For each conviction for the violation of any law, prohibiting or regulating the sale, barter, or exchange of spirituous, vinous, or malt liquors, or intoxicating drinks—\$30.00.'

"Therefore, the fee of \$30.00 should be taxed in those cases of conviction of keeping, selling, having in possession, barter, or exchange of prohibited liquors, and convictions of any law regulating the sale, barter or exchange of spirituous, vinous, or malt liquors, or intoxicating drinks, and as stated above, a fee of \$10.00 is to be taxed in convictions of an attempt to distill or manufacture same." (Emphasis supplied.)

Since the rendering of the quoted opinion, supra, this office has further discussed violations of the Prohibition Law in the following opinions:

"* * * the solicitor's fee on conviction of public drunkenness is ten dollars." Biennial Report of Attorney General, 1926-28, page 570.

The solicitor's fee on conviction of driving an automobile while intoxicated is ten dollars. Biennial Report of Attorney General, 1930-32, page 399.

"* * * the Solicitor's fee of \$30.00 shall be charged in cases where one is convicted of the crime of possessing prohibited liquors." Biennial Report of Attorney General, 1932-34, page 612.

"* * * the proper Solicitor's fee to charge on conviction of an attempt to transport whiskey is \$10.00." Quarterly Report of Attorney General, Vol. 7, page 153; Quarterly Report of Attorney General, Vol. 18, page 18.

"The Solicitor's fee in prosecutions for violation of the Alabama Beverage Control Act is the same as the fee in prosecutions for violation of the old prohibition law, viz: \$30.00, and a warrant or affidavit charging defendant with sale, possession or disposing of spirituous liquors contrary to law, can apply either to violation of the Alabama Beverage Control Act, or the old prohibition law." Quarterly Report of Attorney General, Vol. 8, page 278.

"Illegal possession of prohibited liquor is a statutory misdemeanor, not malum in se, in this State.—Sections 4621 and 4622, 1923 Code of Alabama. Therefore, it is my opinion that an attempt to illegally possess prohibited liquor is a misdemeanor, and such misdemeanor not being otherwise provided for in the schedule of Solicitors' Fees, (Section 3738, 1923 Code of Alabama) a Solicitors' fee of ten dollars (\$10.00) should be taxed upon conviction for same. * * *." Quarterly Report of Attorney General, Vol. 20, page 259.

The fact that the conviction was obtained in either a wet or dry county does not affect the amount of the solicitors' fees legally payable from the convict fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 8, 1949.

Hon. L. R. Grimes, Member,
Board of Revenue,
Montgomery County,
Montgomery 4, Alabama.

County Engineer—Counties—Highways.

1. Title 12, Section 70, Code of Alabama 1940, authorizing state participation in payment of salary of county engineer does not authorize payments of state aid for period of employment of county engineer prior to time that application for aid is made by county and approved by highway director.

2. Title 12, Section 70, Code of Alabama 1940, does not authorize highway director to reimburse counties for past expenditures but only for county engineer's salary incurred after county's application for state aid is approved.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 4, 1948, is as follows:

"Under date of August 9, 1948, your office issued an opinion to Honorable James T. Beeland, Judge of Probate, Butler County, Greenville, Alabama, sustaining the provisions of Title 12, Sections 67-72, Code of Alabama 1940, to the effect that where a County Engineer is appointed pursuant to a local act, and where the qualifications meet those required in the Title and Sections above referred to, and where his salary exceeds \$4,000.00 per annum, the Highway Department is authorized to participate in the payment thereof to the extent of \$2,000.00 per annum.

"Montgomery County has had an engineer employed under the provisions of a local act (Local Acts 1939, page 39) at a salary from March 1, 1939 to the present at a salary in excess of \$4,000.00 per annum.

"In view of the fact that the law authorized the Highway Department to participate in the payment of the County Engineer's salary to the extent of \$2,000.00 per annum because effective on September 19, 1939 (General Acts 1939, page 869), would the holding of your opinion referred to above be retroactive to Sep-

tember 19, 1939 or to the first date on which the Highway Department authorized participation?"

In my opinion the salary of the county engineer may be supplemented by state funds only after the Highway Director has received an application from the county governing body and has authorized prospective expenditures. It is further my opinion that the Highway Director is not empowered to reimburse the county for expenditures made by the county in payment of the salary of a county engineer prior to the time that state participation was authorized by said director.

Title 12, Section 70, Code of Alabama 1940 provides as follows:

"When any county has established the office of county engineer in accordance with the provisions of this chapter, the state highway director, upon application of the court of county commissioners or like governing body, may authorize the expenditure out of the available funds of the highway department of an amount equal to one-half of the salary of said county engineer per annum to apply to payment of the salary of such county engineer herein provided for; provided, however, that the amount contributed or paid by the highway department on the salary of said county engineer shall be of the same proportionate amount for each county employing a county engineer as provided in this chapter. The state highway director may discontinue such payments after thirty days notice in writing to the said court of county commissioners or like governing body, and to the county engineer, unless otherwise agreed to in writing with the county by contract made and entered upon the records of the county governing body."

In order for the county to obtain state aid for the purpose of paying the salary of a county engineer the county governing body must make application to the Highway Director. Then the director may approve (or disapprove) such applications. A county which has made no application is entitled to no state aid because it has not complied with the provisions of Section 70, *supra*. When the county does make application for aid and such aid is authorized by the director as provided in Section 70, *supra*, the state participation in the payment of the salary should begin on the date that the highway director authorizes payment or at any subsequent date designated by the director.

It is further my opinion that Chapter 5, Sections 67-72, Code of Alabama 1940, were enacted to enable counties to employ a county engineer and not to reimburse the county for past expenses.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 8, 1949.

Hon. Lecil Gray,
Judge of Probate,
Walker County,
Jasper, Alabama.

Municipalities—Elections.

1. In determining whether or not the requisite number of qualified electors of a municipality have signed the petition required by Title 37, Section 36, Code of Alabama 1940, to change the form of government of the municipality to a commission form of government, and there has been no municipal census since the 1940 Federal Census, the 1940 Federal Census must be used in such determination.

2. Where the boundaries of a municipality have been extended, and the extended territory does not embrace an incorporated municipality, the inhabitants of the extended territory cannot be included as inhabitants of the municipality for the purpose of determining whether or not a petition filed under the provisions of Section 36, *supra*, contains the requisite number of qualified electors.

3. Biennial Report of Attorney General, 1926-28, page 291, overruled and withdrawn.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir.

Your request for an official opinion, bearing date of January 31, 1949, is as follows:

"There has been submitted to me a petition under Chapter 4, Article 1, Title 37 of the 1940 Code of Alabama, containing 137 names purporting to be qualified electors of the city of Cordova, beat 12, Walker County, Alabama.

"The last Federal census gave the population of the town of Cordova as 1881 citizens. There has been no municipal census taken since the 1940 Federal census, however, the 1947 session of the Legislature extended the boundaries of Cordova and greatly enlarged the population of the city. Said Act can be found on page 395, Local Acts of the Legislature, 1947.

"The Mayor of the city of Cordova, Hon. J. A. Poe, has raised the question with me as to whether or not the last Federal census may be used as a basis to determine whether or not the required

number of qualified electors have signed the petition as provided in Section 36 of Title 37, 1940 Code of Alabama, since the city limits were extended by the 1947 session of the Legislature. Mayor Poe states that the extension of the city limits took in all of the properties of the Textron Southern Company and that the present population of Cordova is approximately 5000. In the absence of a municipal census, I am using the last Federal census as a basis.

"Will you please give me your opinion on the following questions:

"1. Since no municipal census has been made since 1940 of the City of Cordova, is it proper to use the last Federal census, i.e., 1940, as a basis for determining whether or not a prerequisite number of qualified electors have signed the petition, under Title 37, 1940 Code of Alabama.

"2. In the event your answer is in the negative, will you please advise me what I shall use as a basis of determining whether the prerequisite number of electors have signed said petition?

"Since the Code of 1940 makes it mandatory that I certify this petition within fifteen days after receipt thereof, I shall appreciate your prompt attention and early reply to this matter."

Title 37, Section 36, Code of Alabama 1940, provides, in part, as follows:

"Upon the presentation of a petition signed by a number of qualified electors of such city as will equal three voters for each one hundred inhabitants or fractions thereof, according to any federal or municipal census hereafter taken, residing in such city, to the judge of probate of the county in which such city is located or in which a part of such city is located, asking that the proposition of organizing under this article be submitted to the qualified voters of such city, the judge of probate shall examine such petition and determine whether or not the same is signed by the requisite number of qualified electors of such city to authorize such election in such city for the purpose of adopting the provisions of this article, and if such judge of probate shall find said petition contains a requisite number of electors to authorize such an election, he shall within fifteen days from the receipt of such petition certify such fact to the mayor of the city in which such election is so petitioned, and the certificate of the judge of probate as to the sufficiency of said petition shall be final. * * * *"

It will be seen from the above section that, in determining the number of inhabitants of a city to ascertain whether or not the requisite number of qualified electors have signed the petition referred to in said section, the federal or municipal census must be used.

You state in your letter that there has been no municipal census of the town of Cordova since the 1940 Federal Census. It is my understanding that there is no incorporated municipality in the territory taken into the town of Cordova by the extension of the boundaries of said town by Act No. 580, Local Acts 1947, page 395. Therefore, the inhabitants of the extended territory are not to be considered in determining whether or not the requisite number of qualified electors of the town of Cordova have signed the petition under consideration, for the reason that there is no official basis, either by federal or municipal census, for determining the number of inhabitants of the annexed territory.

Answering your first inquiry, it is my opinion that the 1940 Federal Census of the town of Cordova must be used in determining whether or not the requisite number of qualified electors have signed the petition. See *State ex rel. Smith v. Gullatt, et al.*, 218 Ala. 371, 118 So. 746.

In view of the affirmative answer to your first inquiry, it is not necessary to answer your second inquiry.

An opinion found in Biennial Report of Attorney General, 1926-28, page 291, in which a contrary conclusion is reached, is hereby overruled and withdrawn.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 10, 1949.

Hon. Bradley Brown,
License Inspector,
Jefferson County,
Birmingham 3, Alabama.

Licenses—Commission Merchant—Coal Dealers.

Coal mining company that mines its own coal, and also sells coal for other companies on commission under facts set out, is liable for a license as a commission merchant or merchandise broker under Title 51, Section 493, as amended by Act No. 418, General Acts 1943, page 384.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion bearing date of January 30, 1949, is as follows:

"Would a coal mining company who mines their own coal, which they sell to others, but who also sell coal for other mining companies, for which they receive a brokerage or commission, be liable as a commission merchant or merchandise broker under Section 493, Title 51 of the Code of 1940?

Your supplemental letter of March 16, 1949 states:

"That said Coal Company acts as a middleman a broker and never sees or delivers any of the other coal companies' coal."

In my opinion, your question should be answered in the affirmative.

From your facts, it is obvious that the company is acting strictly as a commission merchant or merchandise broker in selling the coal that it does not own. It does not sell or deliver by truck or other motor vehicle as agent or broker as contemplated by Title 51, Section 489, Code of Alabama 1940. The company comes within the provisions of Title 51, Section 493, Code of Alabama 1940, as amended by Act No. 418, General Acts 1943, page 384, which provides as follows:

"§493. Each commission merchant or merchandise broker shall pay one State license of Twenty-five (\$25.00) Dollars and one county license of Twelve and 50/100 (\$12.50) Dollars. Such payment shall be made in the county in which such commission merchant or merchandise broker maintains his principal place of business. Such license shall authorize such commission merchant or merchandise broker to do business in any county of the State without the payment of any further State or county license. The payment of the license in one county of the State as evidenced by the license certificate of the Probate Judge shall be sufficient."

In 27 Words and Phrases (Per. Ed.) at page 84, it is said:

"A 'factor' or 'commission merchant' is one who has the actual or technical possession of goods or wares of another for sale, while a 'merchandise' broker is one who negotiates the sale of merchandise without having it in his possession or control, being simply an agent with very limited powers. * * * *"

This company is liable for a license for each business it engages in. Title 51, Section 838, Code of Alabama 1940, provides as follows:

"§ 838. Persons, firms, etc., engaging in several businesses.—Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 14, 1949.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Counties—Courts of County Commissioners—Elections—Title
12, Sections 12(1) and 177, Code of Alabama 1940.

Houston County as joint owner with the City of Dothan of
utility properties at Napier Field, may join in the disposal of
said property without the necessity of a county election first
approving such action.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of January 11, 1949,
is as follows:

"Please advise me if Houston County can join in the sale, with
the City of Dothan of the electric light and water utilities at Napier
Field, Dale County, Alabama, without holding an election?

"For your information the City of Dothan and Houston County
purchased this site and donated it to the Government for the war
effort. Since the camp was deactivated the property was returned
to the City of Dothan and Houston County and we have sold off
certain real estate and have donated 500 acres and certain buildings
to the State Board of Education for the Trade School. Now it is
the desire to dispose of all holdings."

On January 25, 1949, this office wrote you asking for additional
information on the subject, and this information was in turn forwarded
by you on January 29, 1949. The information that you forwarded consists
of a part of your file in the matter, and after reviewing same, I am of
the opinion that sufficient information is now in hand on which to
predicate an answer to your question.

This information consists of a copy of the agreement and resolutions
accepting delivery of Napier Field from the United States of America
by Houston County and the City of Dothan, a copy of an agreement and
resolution accepting delivery of Dothan Municipal Airport, Houston County,
Alabama, from the United States of America by Houston County and
the City of Dothan, and copies of deeds to the State Board of Education
of 29 acres and 471 acres, respectively, of land at Napier Field by
Houston County and the City of Dothan.

The agreement and resolutions accepting delivery of Napier Field from the United States of America by Houston County and the City of Dothan, evidences the fact that by lease dated April 30, 1941, as modified by supplemental agreements dated July 1, 1944 and August 28, 1946, Houston County and the City of Dothan, as joint owners leased certain property known as Napier Field to the United States of America until June 30, 1966, subject to certain conditions not here pertinent. The purpose of this, as stated, was to further the war effort. On February 21, 1947, the United States of America, acting by and through the War Assets Administrator pursuant to Executive Order 9689, dated January 31, 1946, and the Surplus Property Act of 1944, as amended, surrendered the aforesaid lease and returned Napier Field to Houston County and the City of Dothan, subject to certain conditions of future use by the Civil Aeronautics Administration relative to the airport proper and emergency war powers of Congress and the President.

The utility property, the subject of your inquiry, is included in the above.

On December 20, 1948, Houston County and the City of Dothan, as joint owners of the Napier Field property, executed a deed to certain portions of the property (subject to the conditions imposed by the United States of America, in the surrender lease agreement aforementioned), to the State Board of Education for the purpose of using the property as a situs for a Regional Trade School. The utility property was not included in these deeds.

All of the above documentary evidence appears in proper form and duly authenticated.

As indicated by the documentary evidence hereinbefore referred to and as stated in your letter of inquiry, the utility property is currently held under joint ownership of Houston County and the City of Dothan, and it is now the desire of these governmental agencies to dispose of said utility property holdings.

With the facts thus outlined, your inquiry is directed to the question of whether or not Houston County can join in the sale, with the City of Dothan, of the aforementioned utility property, without holding a county election.

Title 37, Sections 378, et seq., Code of Alabama 1940, makes it mandatory for incorporated municipalities to hold an election resulting in the approval of the sale, lease, or other disposition of an electric, gas, or waterworks utility owned by the municipality, before said utility property may be disposed of. This statute is thus applicable insofar as the City of Dothan is concerned.

However, there are no such mandatory statutes imposed upon county governments in the disposal of county property. Relative to county

property, Title 12, Section 12(1), Code of Alabama 1940, reads in pertinent part as follows:

"The court (I interpolate—Court of County Commissioners or Board of Revenue) has authority: 1. To direct and control the property of the county, as it may deem expedient according to law. * * *"

Title 12, Section 177, Code of Alabama 1940, also reads as follows:

"§ 177. Commissioners have custody of property, and may sell.—The court of county commissioners have control of all property belonging to the county, and may, by an order to be entered on its minutes, direct the disposal of any real property, which can be lawfully disposed of, and direct the probate judge to make titles thereto; and a conveyance made by the probate judge in accordance with such order invests the grantee with the title of the county."

In view of our Alabama statutory law, as noted above, it is my opinion that under the joint ownership of Houston County and the city of Dothan of the utility property in question, the City of Dothan must hold an election approving sale or conveyance of its municipal interests, whereupon Houston County may join in a disposal of said property without the necessity of a county election approving same, and you are so advised.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 14, 1949.

Honorable J. R. Thomas,
Mayor of Billingsley,
Autauga County,
Billingsley, Alabama.

Sunday Laws.

Combination service station and grocery store may legally stay open on Sunday for the sale of gasoline, oil and other motor lubricants.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of November 1, 1948, is as follows:

"I want to know if a combination Service Station and Grocery Store can stay open legal on Sunday in the Corporation of a town."

I am of the opinion that your inquiry must be answered in the affirmative. However, in view of the explicit provisions of Title 14, Section 420, Code of Alabama 1940, I am further of the opinion that such type of business as described in your request will be restricted to the sale on Sunday of gasoline or other motor fuels or motor oils only.

Title 14, Section 420, *supra*, reads in part as follows:

"§ 420. Any person * * * * * who, being a merchant or shop-keeper, druggist excepted, keeps open store on that day, shall be fined not less than ten nor more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than three months; * * * *. Nothing herein shall prevent the sale of gasoline or other motor fuels or motor oils on Sunday."

Your attention is invited to the fact that while the above quoted statutory provision prohibits the keeping of open store on Sunday, it expressly excepts the selling of motor fuels, etc.

Your attention is further invited to the following quotation from 60 Corpus Juris 1046, Section 20:

"Although an establishment where more than one kind of goods or services is dealt in may ordinarily keep open for the supplying of any of them which the statute *excepts* or does not prohibit, it may nevertheless *not* continue to supply such as do fall within the statutory prohibitions, and doing so is, at least to that extent, an unlawful keeping open, *unprotected* by the lawful transactions carried on at the same place." (Emphasis supplied.)

State v. Gelpi, 48 So. Ann 520, 19 So. 468;

Fichtenbery v. Atlanta, 126 Ga. 62, 54 S. E. 933.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 15, 1949.

Hon. James E. Folsom,
Governor of Alabama,
Executive Department,
CAPITOL.

Department of Commerce—Fire Marshal—Appropriations—
Legislature.

1. The legislature had authority to divert (reappropriate) the "Fire Marshal Tax" levied under the provisions of Schedule

160.19 of the General Revenue Act of 1935, Act No. 194, General Acts 1935, page 256, to the general fund of the State.

2. Under the provisions of Act No. 379, General Acts 1939, page 505, the proceeds of the "Fire Marshal Tax" must be paid into the general fund of the State, notwithstanding the fact that such tax was levied for the purpose of maintaining the office of the State Fire Marshal and paying the expenses incident thereto.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of January 13, 1949, is as follows:

"Your official opinion is requested upon the following law:

"The Act of 1919 created the office of the State Fire Marshal and levied a special tax to finance same. This revenue was held in a special fund by the State Treasurer for that purpose, however, and act of the Legislature of 1939 provided that the revenue from this tax should be paid into the General Fund. Since 1939 the State Fire Marshal has received funds from the regular appropriation of the Department of Commerce.

"1. Did the Legislature have the authority to divert the taxes levied under the original act of 1919 creating the office of State Fire Marshal into the General Fund?

"2. By the Act of 1939 Legislature could the taxes levied under the Act of 1919 be paid into the General Fund when they were levied for a special and specific and direct purpose and not levied to be used from the general fund?

"I will thank you for your opinion at as early a date as possible."

The office of State Fire Marshal was abolished by Act No. 4, General Acts 1935, page 3, and the State Superintendent of Insurance was made State Fire Marshal Ex Officio by the same act. The rights, powers and duties of the State Fire Marshal were transferred to the State Fire Marshal Ex Officio.

The "Fire Marshal Tax" was levied by Schedule 160.19 of the General Revenue Act of 1935, Act No. 194, General Acts 1935, page 256 (Title 51, Section 827, Code of Alabama 1940), which schedule is as follows:

"Schedule 160.19. For the purpose of maintaining the office of State Fire Marshal and paying the expenses incident thereto, every fire insurance company and other insurance companies writing fire

insurance on automotive vehicles, whether upon the stock or mutual plan, and all individuals, firms, corporations, associations, or aggregations of underwriters, doing fire insurance business in the State of Alabama shall pay to the superintendent of insurance on or before the first day of March annually, in addition to the taxes now required by law to be paid by such companies, associations, partnerships, firms or individuals, two-fifths of one per cent of the gross premium receipts, less return premiums of all such companies, firms, individuals, associations or partnerships on all business done in the State of Alabama during the year preceding to be included in their annual statement under oath to the bureau of insurance for the fiscal year ending Decemehr 31st, in case such company, association, firm, partnership, or aggregation of underwriters is now required by law to make such annual report, or does make such annual report."

Schedule 160.21 of Act No. 194, supra, is as follows:

"Schedule 160.21. The Superintendent of Insurance shall certify the money so received into the State Treasury as a special fund for the maintenance of said office of State Fire Marshal, and the expenses incident thereto. Any portion of the said fund remaining unexpended on January 1st next year after the end of any fiscal year shall be covered into the General Fund of the State Treasury."

The Department of Commerce was created by Act No. 14, General Acts 1939, page 11. Section VIII of this act, as amended by Act No. 170, General Acts 1939, page 294, provides:

"Section VIII. All powers, authority, duties, and functions now by law vested in, conferred upon or required to be exercised by the Bureau of Insurance, the Superintendent of Insurance and the Fire Marshal Ex-Officio are hereby transferred to, vested in and conferred upon the Bureau of Insurance of the Department of Commerce as herein created."

Under the provisions of Section X of Act No. 170, supra (Title 55, Section 26, Code of Alabama 1940), the Department of Commerce was charged with the execution of all laws then in force or which might thereafter be enacted, "relating to insurance, insurance companies, associations, exchanges and societies and their agents and representatives doing business in the State * * * and all such laws relating to the office of Fire Marshal, Ex-officio."

In an opinion of this office rendered under date of July 18, 1939, and found in Quarterly Report of Attorney General, Vol. 16, page 56, it was held that all appropriations and funds accruing to the various bureaus, boards and departments, which then constituted and composed the Department of Commerce, could be consolidated into one fund and be used to pay the salaries and defray the expenses of the Department of Commerce.

After quoting Sections XI and XII of Act No. 170, *supra*, it was said in the above referred to opinion:

"It will be noted from a careful examination of the above quoted sections, *supra*, that the personal property possessed by and all appropriations made to any department, board, bureau, commission, agency or office of the State, the functions and duties of which were transferred and assigned to the Department of Commerce, and subject to be delivered to or otherwise made available to the Director of Commerce upon his request. It will further be noted that all appropriations for the payment of employees whose employment in any department, board, bureau, commission, agency or office of the State, the employments of which were transferred to said department, are by Section XII, *supra*, transferred and assigned to the Department of Commerce. In 59 C. J. page 238, Section 382 we find the following statement:

"The legislative power is supreme in matters relating to appropriations as to which no constitutional restrictions exist. Constitutional provisions requiring the existence of appropriations made by law secure to the legislature this exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government, and are conservative, not restrictive or prohibitory of the legislative power over the public revenue.'

"As above noted the power of the legislature is supreme in matters relating to appropriations. The only check on this power of the legislature is the constitution and in this particular matter we find no inhibitions in the constitution of Alabama. Not only is the legislature supreme in matters relating to appropriations, but has the same powers to reappropriate funds of the State. In *State ex rel Scaffler et al v. Griswold, Director of Public Welfare et al*, 35 Ohio App. 354, 172 N. E. 438, the following principle of law was laid down:

"The power of the Legislature to reappropriate is as broad as it is to appropriate originally.'

"We find that in the matter before us that appropriations had been made by the legislature to various bureaus, boards, and departments which bureaus, boards and departments were by the act as amended, creating the Department of Commerce, relieved of their individuality and made a part of said department. The legislature as heretofore noted made provision for the appropriations previously made to these various bureaus, boards, and departments to be transferred and assigned to the Department of Commerce and made available to the Director of Commerce upon his request. This amounted to a reappropriation of these funds. As above noted the power of the legislature to appropriate and reappropriate funds are

supreme and this therefore brings us to the final question involved. That is, whether it was the intention of the legislature that all the appropriations and funds accruing to the various bureaus, boards and departments which now constitute and make up the Department of Commerce should be consolidated into one fund which would be used to pay the salaries and defray the expenses of the Department of Commerce. If this was their intention, it is our opinion that under the authorities heretofore cited as to the power of the legislature over appropriations, that the provisions of the act, as amended, creating the Department of Commerce, supersedes all other laws, thus making such a consolidation permissible. * * *

It will be seen from the above opinion that notwithstanding the fact that the "Fire Marshal Tax" was levied for the "purpose of maintaining the office of State Fire Marshal and paying the expenses incident thereto," (Schedule 160.19, *supra*) and that it was the duty of the Superintendent of Insurance to certify the proceeds of such tax into the State Treasury as a special fund for the maintenance of the office of the State Fire Marshal and the expenses incident thereto (Schedule 160.21, *supra*), that the funds derived from such tax could be consolidated with other funds of the Department of Commerce and used to defray the expenses of the Department.

Act No. 379, General Acts 1939, page 505 (Title 55, Section 28, Code of Alabama 1940), provides, in part, as follows:

"Section 1. That all moneys accruing to or collected by or through the Department of Commerce or any bureau or division thereof or as a result of any statute which said Department of Commerce or any bureau or division thereof may now or hereafter be charged with the duty of administering shall, when collected, be covered into the State Treasury to the credit of the General Fund; provided, however, that the provisions hereof shall not apply to the moneys appropriated to said department from time to time from the General Fund.

"Section 2. That all laws and parts of laws, general, special or local, in conflict with the provisions of this Act are hereby expressly repealed."

Schedule 160.19 of Act No. 194, *supra*, was brought forward without change in the Code of Alabama 1940 as Title 51, Section 827. Schedule 160.21 of the same act was not brought forward into the 1940 Code of Alabama and was, therefore, repealed.

The adoption by the legislature of the 1940 Code of Alabama was a simultaneous re-enactment of Act No. 379, *supra*, and Schedule 160.19 of Act No. 194, *supra*.

"In 25 R. C. L. 925, § 175, it is said: 'It has been held that where two inconsistent statutes are carried into the codified law, the one last passed, which is the latter declaration of the legislative will, should prevail.' See *Adkins v. Arnold*, 235 U. S. 417, 35 S. Ct. 118, 59 U. S. (L. ed.) 294; *Hillsborough County v. Jackson*, 58 Fla. 210, 50 So. 423; 25 R. C. L. 925, Statutes, § 175, Note. 16.

"The foregoing rule of construction is followed by our own court of last resort. Where there is conflict, repugnancy or inconsistency between two provisions of law as they appear in the Code, the court will look to their history and origin and give effect to that provision which was last enacted by the legislature, as being the last expression of its will and intent. The later enactment will prevail over the earlier one in so far as the earlier act is in conflict with or inconsistent with the later enactment. *Calhoun County v. Watson*, 152 Ala. 554, 44 So. 702; *Zaner v. State*, 90 Ala. 651, 8 So. 698; *Gunter v. State*, 83 Ala. 96, 3 So. 600; *Steele v. State*, 61 Ala. 213; *O'Neal et al. v. Robinson*, 45 Ala. 526; *Ex Parte Ray and Defoe*, 45 Ala. 15." Quarterly Report of Attorney General, Vol. 50, page 42.

Act No. 379, supra, became a law on September 15, 1939, and Schedule 160.19 of Act No. 194, supra, became a law on July 10, 1935. These statutes are inconsistent in that Act No. 379, supra (Title 55, Section 28, Code of Alabama 1940), provides that all moneys accruing to or collected by the Department of Commerce shall be covered into the State Treasury to the credit of the general fund, whereas Schedule 160.19 (Title 51, Section 827, Code of Alabama 1940) levies the "Fire Marshal Tax" for the purpose of maintaining the office of State Fire Marshal Ex Officio and paying the expenses incident thereto. In view of the fact that Act No. 379, supra, is the latter declaration of the legislature, it will prevail over Schedule 160.19 of Act No. 194, supra.

In view of the above authorities and conclusions, it is my opinion: (1) That the legislature had authority to divert the "Fire Marshal Tax" levied under Schedule 160.19, supra, to the general fund of the State; and, (2) that under the provisions of Act No. 379, supra, the proceeds of the "Fire Marshal Tax" must be paid into the general fund of the State, notwithstanding the fact that such tax was levied for the purpose of maintaining the office of the State Fire Marshal and paying the expenses incident thereto.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

February 15, 1949.

Hon. A. C. Shelton, Superintendent,
Calhoun County Schools,
Anniston, Alabama.

Schools—Bonds—Calhoun County.

Under the Calhoun County Special School Tax Amendment to the Constitution of Alabama of 1901 the proceeds from the sale of bonds must be spent for public school purposes in the district for which the bonds were sold.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of January 17, 1949, is as follows:

"A special five-mill tax amendment for Calhoun County and the cities of Calhoun County was ratified by the voters of the State on January 6, 1948. The tax was ratified by the voters of the County on March 16, 1948. It is quite clear that any money collected from the tax must be spent in respective school districts of Anniston, Piedmont, Jacksonville, or the County. There are two school districts in Calhoun County. Bonds were sold in the amounts of \$200,000 for district one and \$500,000 for district two. Is it mandatory that all of the \$200,000 received from bonds on district one, be spent in district one and all of the \$500,000 received from bonds in district two, spent in district two; or can the total amount of \$700,000 be spent wherever the need exists regardless of district lines?"

Your question may be answered simply by saying that one cannot do indirectly what he is prohibited from doing directly. The Calhoun County Special School Tax Amendment to the Constitution of Alabama provides: "The funds arising from the special school tax to be levied hereunder and to be collected therefrom shall be expended for public school purposes for the exclusive benefit of the school district in which collected. . . ." The amendment further provides: "After said tax has been voted, and without further authorization or authority, as and when requested by the Board of Education of Calhoun County, Calhoun County shall issue and sell interest bearing bonds with principal and interest to be paid from the funds to be derived from the special school tax hereby levied in each school district in Calhoun County . . . and said funds arising from said school tax may be pledged by Calhoun County for the payment of said bonds and interest thereon. . . ." (Emphasis Supplied)

It is clear that the funds collected as part of the special school tax must be spent for the exclusive benefit of the school district in which collected. The bonds whose issuance is authorized by this amendment

are to be paid from funds to be derived from said special school tax. In effect, therefore, when the proceeds from the sale of the bonds is spent, the tax proceeds are actually being spent. It would seem unreasonable to say that the same limitations on the tax proceeds do not apply to the proceeds from the sale of the bonds.

Thus, the \$200,000.00 received from bonds in District 1 must be spent for the exclusive benefit of District 1; and \$500,000.00 received from bonds in District 2 must be spent for the exclusive benefit of District 2.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 15, 1949.

Honorable R. K. Greene,
Judge of Probate,
Hale County,
Greensboro, Alabama.

Prisoners—Title 45, Sections 125 and 129, Code of Alabama
1940.

County not liable for hospital and medical expenses of prisoner where no authorization given by county officer.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of January 29, 1949, is as follows:

"The purpose of this letter is to obtain your opinion with respect to the liability of Hale County, Alabama, for hospital bill of a defendant who was injured by arresting officers who were game wardens of the State Department of Conservation.

"Some days ago, the game wardens employed by the State Department of Conservation apprehended the defendant who was hunting in violation of law. According to the arresting game wardens, the defendant resisted arrest, and tried to inflict bodily injury upon them. They deemed it necessary to use force and the defendant was shot in the leg with a pistol. The wardens in question took the defendant to the office of a local physician and had him treated. The physician recommended hospitalization. Thereupon, the wardens contacted their district supervisor and placed the defendant in a hospital.

"No officer of this county knew of the occurrence until the defendant had been treated by local physician and the wardens had determined to take him to a hospital in another county. Warrant of arrest was not obtained until the next day or so. No officer of the county authorized the hospitalization of this defendant and no officer of the county agreed to pay the hospital expenses. One warrant charges violation of game laws. The other charges assault with intent to murder. Both warrants were sworn out before me as Judge of the County Court.

"It is my understanding that the hospital where the defendant is being treated has been instructed by the wardens to charge the account to Hale County. In your opinion, would Hale County be liable for the hospital and medical expenses of this defendant in question? Your attention is called to the fact that no fines for violation of game laws are paid into the Fine and Forfeiture Fund of the County, but all such fines, arrest fees, etc., are paid direct to the Department of Conservation."

I am of the opinion that your inquiry should be answered in the negative.

Title 45, Section 125, Code of Alabama 1940, provides as follows:

"§ 125. Necessary clothing, medicines, medical attention, etc., to insolvent prisoners.—Necessary clothing and bedding must be furnished by the sheriff or jailer, at the expense of the county, to those prisoners who are unable to provide them for themselves; and also necessary medicines and medical attention to those who are sick or injured, when they are unable to provide them for themselves."

Title 45, Section 129, Code of Alabama 1940, provides as follows:

"§ Removal of prisoners in ill health.—When the life or health of any prisoner, who is not confined under process from any court of the United States, may be seriously endangered by longer confinement in jail, and that fact is made to appear clearly to any circuit judge, or to the judge of the county court of the county, such judge must, by an order in writing, direct the sheriff or jailer to remove him to some suitable place, or hospital, as near as may be to the jail, and there safely keep him until his health is sufficiently restored to authorize his recommitment to jail."

In my opinion, the above quoted sections impose liability on the county for medical and hospital expenses of prisoners only when certain conditions are met. First, the prisoner must be unable to provide treatment or hospitalization for himself, and secondly, treatment or hospitalization must be by written order of the circuit judge or the county judge.

In the case of *Malone v. Escambia County*, 116 Ala. 214, 22 So. 503, the Supreme Court of Alabama, in construing the then applicable statutes, Code of Alabama 1886, Sections 1471 and 4542, predecessors of the present applicable statutes, held that the sheriff also may authorize the removal of a prisoner to a hospital. In its opinion, the Court stated:

"When reading the two sections together, taking into consideration the history of their respective enactments and continuance in the Codes, it cannot be doubted that the duty imposed by them, may be performed either by the sheriff or the probate judge. It may be, that it would be better, ordinarily, for the sheriff to comply with the provisions of the first-named section, and allow the judge of probate to act in the premises, but if he should not do so, for any reason, the liability of the county for medicines and medical attendance provided by him, under circumstances allowed by the latter section, would be no less binding on the county, than when supplied by the probate judge under the former section."

In your request for an official opinion, you state that no officer of the county authorized the hospitalization or agreed to pay the expenses. In view of this, I find no authority for payment by the county of the expenses mentioned.

Your attention is invited to an opinion of this office directed to Honorable J. S. Freeman, Chairman, Board of Revenue, Walker County, Jasper, Alabama, under date of June 26, 1946 (Quarterly Report of Attorney General, Volume 43, page 58), which supports this view.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 16, 1949.

Hon. John Graves,
State Comptroller,
Department of Finance,
CAPITOL.

Licenses—Department of Finance.

The Department of Finance can properly charge the cost of printing forms of licenses to the Privilege License Tax.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of August 26, 1948, is as follows:

"Section 844, Title 51, 1940 Code of Alabama, provides that it is the duty of the Department of Finance to prepare forms of privilege licenses and this office has, for several years, designed the forms to be used for this purpose. Under the prior lump sum appropriation to the Finance Department by the Legislature, the financing of these supplies has not been a problem.

"The 1947 Legislature, under Act No. 320, places close cost scrutiny and stricter budgetary provisions on the Department of Finance by appropriating to each Division of the Department a fixed amount for salaries and expenses and under such an appropriation breakdown as that provided for the various divisions of the Department of Finance, an expenditure for privilege licenses out of any Division in the Department of Finance would result in an appropriation wrongfully expended and a violation of Section 106, Title 55.

"Please furnish us with your official opinion covering the following questions:

"1. Can the cost of printing privilege licenses be properly charged as a collection expense against the Privilege License Tax which is a General Fund revenue?"

I am of the opinion that your request must be answered in the affirmative.

Title 51, Section 844, Code of Alabama 1940, reads as follows:

"§ 844. Duty of department of finance to prepare forms of licenses.—It shall be the duty of the department of finance to prepare and have printed suitable forms of licenses, and as often as need be to furnish to the several probate judges blank licenses signed by him sufficient for the probable wants of their respective counties, taking their receipts for the same. * * * * *

I construe the above-quoted code provision as placing a mandatory duty upon the Department of Finance to prepare and have printed suitable forms of licenses and distribute same to the probate judges.

Therefore, it is my opinion that the costs incurred by the Department of Finance in having said forms of licenses printed can properly be charged as a collection expense against the Privilege License Tax which is a General Fund revenue.

I invite your attention to the recent opinion of this office, in which a similar holding was rendered in regard to the cost of printing poll tax receipts. See opinion to Hon. John Graves, State Comptroller, under date of October 7, 1948.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 17, 1949.

Honorable Bradley Brown,
License Inspector,
Jefferson County,
Birmingham 3, Alabama.

Taxation—Tobacco Tax—National Guard—Exemption.

1. Since Act No. 414, General Acts 1947, page 304, levies a tax upon the consumer of the tobacco products enumerated therein and not upon the seller or distributor, the Alabama National Guard is not exempt from the provisions of such Act, but is required to collect the tax from the consumers and remit the same to the proper county officials.

2. The exemptions granted by Title 35, Section 110, Code of Alabama 1940, to canteens and post exchanges of the National Guard are not applicable to the tax levied upon consumers of tobacco products by Act 414, General Acts 1947, page 304.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion, bearing date of January 5, 1949, is as follows:

"Act No. 414 of the General Acts of the Legislature of Alabama passed at the 1947 session of the Legislature levies a tax on tobacco products sold, stored or delivered in any county of the State having a population of 400,000 inhabitants or more. (General Acts of Alabama of 1947, page 304 et seq.). Section 3½ of said Act provides that 'Every person, firm, corporation, club, or association that sells or stores or receives for the purpose of distribution any articles containing tobacco enumerated in this act shall add the amount of the license or privilege tax levied and assessed herein to the price of the article, it being the purpose and intent of this provision that the tax levied is in fact a levy on the consumer with the person, firm, corporation, club, or association who sells or stores or receives for the purpose of distributing the articles enumerated herein acting merely as agent of the county for the collection of the tax.'

"Local representatives, or officers, in the Alabama National Guard contend that cigarettes and other smoking tobacco purchased by the National Guard from wholesale tobacco dealers in this county and thereafter sold by the National Guard to members of the Guard are exempt from the tax levied by said act. Such claim for exemption is based upon the exemption from taxation granted to the National Guard by the statutes of Alabama. Upon the theory that

the tax is levied upon the consumer of the cigarettes (or other smoking tobacco) and is not levied upon the National Guard, and upon the further theory that the imposition upon the National Guard of the duty to collect the tax here involved no more infringes any exemption from taxation granted the National Guard than does the Federal requirement that States and subdivisions of States collect the Federal Income Tax by withholding wages infringe State immunity from Federal taxation. I have taken the position that the cigarettes and smoking tobacco referred to above are subject to the tax levied by said act.

"I desire your opinion on the question of whether cigarettes and smoking tobacco purchased from wholesale dealers located in Jefferson County by the National Guard and thereafter sold to members of the Guard are subject to the tax levied by the above cited act.

"The County of Jefferson, every municipality in the County of Jefferson, and the members of the National Guard are interested in this question and are desirous of securing your opinion thereon at your earliest convenience. I shall appreciate your advising me as soon as practicable on the question above submitted."

It is my opinion that your question should be answered in the affirmative.

Title 35, Section 110, Code of Alabama 1940, providing for an exemption from taxation of post exchanges and canteens of National Guard Units is as follows:

"All post exchanges, or canteens owned, operated, and run exclusively by national guard units shall be exempt from the payment of all state, county, city or town licenses and taxes, and shall be exempt from payment of tobacco and gasoline tax to state, county, city or town when operated in accordance with such rules and regulations as the adjutant general may provide and the governor may approve, when the profits of such canteens or exchanges go to the national guard or naval militia units and not to the operators of such enterprises."

The tobacco tax referred to by you is levied by Act No. 414, General Acts 1947, page 304.

Section 3 of such Act provides that every person who sells, stores, or delivers any cigarettes or smoking tobacco in any county subject to the provisions of the Act shall pay a license tax to the county upon the basis of the rates thereafter set forth by such section.

Section 3½ provides that persons selling, storing, or receiving for the purpose of distribution any articles containing tobacco enumerated

in such Act "shall add the amount of the license or privilege tax levied and assessed herein to the price of the article, it being the purpose and intent of this provision that the tax levied is in fact a levy on the consumer with the person, firm, corporation, club, or association who sells or stores or receives for the purpose of distributing the articles enumerated herein acting merely as agent of the county for the collection of the tax." (Emphasis added.)

Section 3½ further provides that it is a misdemeanor for any person to fail or refuse to add to the sales price and collect from the purchaser the amount due on account of the tax therein provided.

By this Act, the legislature levied a tax upon the consumer of the tobacco products. The distributor or seller is merely the collecting agent for the county.

Section 3 provides also that it is the intent of the legislature that such license tax shall be paid but once on each package of cigarettes or smoking tobacco. It is provided that when the tax shall have been paid by a wholesaler or seller of cigarettes or smoking tobacco, such payment shall be sufficient. The effect of these provisions is that the liability to remit the tax falls upon each successive dealer, seller, or storer, but that a payment of the tax by any one of such persons shall discharge the liability of all such persons.

It is my opinion that the Act in question does not levy a tax upon the National Guard, or a post exchange, or canteen thereof. It levies a tax upon the consumer of the tobacco.

It is settled that a statute can levy a tax upon one person and require another person to collect it as an agent for the levying authority and that the agent is not the taxpayer. *Colorado Nat. Bank of Denver v. Bedford*, 60 S. Ct. 800, 310 U. S. 41, 84 L. Ed. 1067.

There is a distinction between taxes which are levied upon a post exchange or canteen of the National Guard and taxes which are levied upon the consumer but are required to be collected by the National Guard. This opinion is not in conflict with the opinion in Quarterly Report of Attorney General, Vol. 51, page 96.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 17, 1949.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Poll Tax—Exemption.

Under the provisions of Section 194½, Constitution of Alabama 1901, adopted as Amendment No. XLIX to the Constitution of Alabama, a person is not entitled to exemption from the payment of poll tax by reason of service in the commissioned corps of the Public Health Service during time of war.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of October 5, 1948, is as follows:

"I enclose you herewith a certificate from the U. S. Public Health Service containing a statement of service of Everett L. Bishop, Jr. during the World War period, which appears to give Mr. Bishop full military benefits for his service in the U. S. Public Health Department during the World War period.

"Mr. Bishop has registered to become a qualified voter in Tuscaloosa County. This certificate I enclose has been presented to me with a request that I give him poll tax exemption in compliance with Amendment Section 194½ of the Constitution of Alabama which gives poll tax exemption to people who served in various branches of military service as outlined in the Amendment. However, the list of those entitled to poll tax exemption does not include exemption for those who served in the U. S. Public Health Service, yet it appears to me that the Amendment intended to include all service men who were engaged in some vital National Defense organization during the World War period.

"Does the certificate and information thereon which I enclose you entitle Mr. Bishop to Poll Tax exemption under the Amendment referred to or any other Amendment or law in effect that grants Poll Tax exemption to any group of individuals?

"Your usual prompt attention to this inquiry will be appreciated. It will also be appreciated if you return to me the enclosure in order that I may hand it back to Mr. Bishop."

In my opinion, your inquiry must be answered in the negative.

The constitutional provision pertinent to your inquiry is Section 194½, Constitution of Alabama 1901, adopted as Amendment No. XLIX. to the Constitution of Alabama, which amendment was proclaimed ratified upon November 17, 1944. This amendment provides as follows:

"Section 194½. No person who honorably served in the military service of the United States between January 1, 1917 and November 11, 1918, or between September 16, 1940 and December 8, 1941, or at any time, past or present or future, when the United States was, is or shall be at war with any foreign state, shall be required after the beginning of such service to pay the poll tax specified in the Constitution of Alabama as a prerequisite to the privilege of voting in Alabama; but, on the contrary, every such person shall be exempt from the payment of all poll taxes which have theretofore accrued and have not been paid or which may thereafter accrue; Provided, however, that if any such person is discharged dishonorably from said service the exemption herein provided is forfeited, and such dishonorably discharged person, as a prerequisite to the privilege of voting in Alabama thereafter, must pay the poll tax specified in the Constitution of Alabama as if such person had never been in such service. The term 'military service' as used in this section includes service in the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, the Women's Army Auxiliary Corps, the Women's Appointed Volunteer Emergency Service, and the Women's Reserve of the United States Navy. The United States shall not be deemed at war with a foreign state within the meaning of this section at a time when an armistice exists between the United States and the foreign state. The Judge of Probate shall issue a certificate of exemption to a person exempt from the payment of poll tax by reason of this section under such rules and regulations as may be prescribed by the Governor. This section shall be self-executing and retroactive; but the Legislature is authorized to enact laws designed to carry out the purposes of this section."

It is to be observed that the above amendment exempts from the payment of poll tax all persons who honorably served in the military service of the United States between the dates therein set out or at any other time past, present or future, when the United States was, is or shall be at war with any foreign state. However, such amendment further specifically defines, or spells out, the meaning to be given the term "military service" as used within such constitutional provision, it being there stated that such term shall include service in the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, the Women's Army Auxiliary Corps, the Women's Appointed Volunteer Emergency Service, and the Women's Reserve of the United States Navy.

Had the language of such amendment provided exemption to all persons honorably serving in the military service without specific definition of the term as so used, it might well be that the person here considered might be deemed to be included within such exemption. How-

ever, in my judgment, the inclusion of the specific definition of such term obviates any necessity for interpretation or construction of such amendment and restricts the exemption therein granted to those persons honorably serving in the component branches of the military service therein designated. It is to be noted that these fail to include the commissioned corps of the Public Health Service.

I have reviewed the provisions of Public Laws Nos. 184 and 410, 78th Congress, together with Executive Order No. 9575, and it is my judgment that such enactments and orders only declare that the commissioned corps of the Public Health Service shall be deemed a part of the military service and a branch of the land and naval forces of the United States for the duration of World War II, and that those persons serving therein are entitled to certain military benefits provided by the Federal Government accruing to other members of the military service, including the benefits arising under the Soldiers' and Sailors' Civil Relief Act and the National Service Life Insurance Act, among others. Such, in my judgment, can in no way affect the right of one serving in the commissioned corps of the Public Health Service to exemption from the payment of poll tax in the State of Alabama, a right which arises under the Constitution of this State.

I am, therefore, of the opinion that one serving in the commissioned corps of the Public Health Service is not entitled to exemption from the payment of poll tax under the provisions of the Constitution of Alabama for the simple reason that the right to such exemption is not extended to such persons under the precise and definite language of Section 194½, supra, and construing, as I must, strictly the exemption feature of such constitutional provisions, I can only reach the conclusion that the person of whom you inquire is not entitled to exemption from the payment of poll tax by reason of his war time service in the commissioned corps of Public Health Service.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 17, 1949.

Hon. Roy O. Hill,
Clerk of the Inferior Court,
Houston County,
Dothan, Alabama.

Houston County—Inferior Courts—Costs and Fees—Trial Tax
—Solicitors.

1. The charge and not the conviction determines the general schedule of fees to be taxed in criminal cases in the Inferior Court of Houston County.

2. Solicitor's fees are based on conviction and not charges.

3. A trial judge may not remit costs due the clerk and sheriff.

4. A trial judge may not remit the trial tax.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of February 4, 1949, is as follows:

"The Inferior Court of Houston County, Alabama, was created in lieu of The County Court of Houston County, Alabama (Acts 1947, pg. 226—Section 1).

"Fees taxed in criminal cases in The Inferior Court are to be the same as fees of a J. P. Court in cases cognizable by J. P. Courts, and in all other misdemeanors are to be taxed the same as in County Court.

"When a case is docketed against a defendant for assault and battery with a weapon, which is an offense of which justices of the peace do not have final jurisdiction, and the defendant is found guilty of assault and battery without a weapon, which is an offense of which justices of the peace have final jurisdiction, would it be proper to tax the cost under the J. P. scale of fees or under the County Court scale of fees with a Solicitor's Fee of \$10.00 instead of \$15.00?

"Does the Judge of The Inferior Court of Houston County, Alabama have authority, when finding a defendant guilty, to, at the same time, remit certain items of Clerk's fees and certain items of Sheriff's fees? Would he also have authority to remit the trial tax?"

In my opinion, the offense charged and not the offense for which accused is found guilty determines the schedule of fees to be used in the Inferior Court of Houston County. The solicitor's fee, however, is determined by the offense for which accused is convicted and not the charge. The judge of the Inferior Court of Houston County is not authorized to remit clerks and sheriffs' fees, nor the trial tax.

The local act establishing the Inferior Court of Houston County is Act No. 315, Local Acts 1947, page 226. Section 7 thereof, applying to costs, provides in part as follows:

" . . . the court shall have authority to tax costs for the use of the county as follows: . . . 4) in each criminal case involving an offense of which justices of the peace have final jurisdiction, the same as in justice courts; 5) in every other criminal case, the same as in county courts. (c) . . . in every criminal case, a trial tax of three dollars (\$3.00) shall be collected for the use of the county.

Section 8 of the local act, *supra*, requires the county deputy solicitor to prosecute all criminal cases without additional compensation.

In my opinion, subsections 4 and 5 of Section 7, *supra*, make a distinction between two groups or classes of criminal cases, namely, those offenses or cases where justices of the peace have final jurisdiction as prescribed in Title 13, Section 417, Code of Alabama 1940, and certain other sections of the Code, and those offenses where a justice does not have final jurisdiction. The costs and fees to be taxed in the former type or class of cases are the same as would be taxed in a justice court, while the costs and fees allowed for offenses of the latter group are the same as would be allowed in the county court. Since the above-quoted provisions in authorizing taxation of costs refer to certain groups or types of cases without reference to convictions for lesser offenses, it is my opinion that the offense charged in the affidavit, complaint, and warrant should be used to determine the schedule of fees regardless of whether accused is convicted for a lesser offense.

The statute authorizing solicitor's fees, however, measures the amount of the fee by convictions as distinguished from the original charge. See Title 11, Section 85, Code of Alabama 1940, also Quarterly Report of Attorney General, Vol. 25, page 143.

In determining the solicitor's fee, therefore, the **conviction** and not the **charge** governs the amount of the fee. Thus, in the case given by your inquiry, the general schedule of fees to be taxed would be county court fees, the **charge** being of a type of case over which a justice of the peace has no final jurisdiction. The amount of the solicitor's fee would be ten dollars, because the conviction was for "a misdemeanor, not otherwise provided for." See Title 11, Section 85, Code of Alabama 1940. Had the **conviction** also corresponded to the charge, another fee of \$15.00 would have been applicable to the solicitor.

In my opinion, the judge of the Inferior Court of Houston County has no authority to remit clerks' and sheriffs' fees. If those officers have performed certain services, the fees should be taxed as costs. See *Chisholm v. State*, 42 Ala. 527, and 20 C. J. S., p. 702. Your inquiry does not state the reasons for which the judge remits costs.

Neither is the judge empowered to remit trial tax. Trial tax has been held to be revenue—a tax—although collected as court costs. Cf. Title 51, Section 20, Code of Alabama 1940. *State v. Montevallo Coal Mining Co.*, 29 Ala. App. 318, 197 So. 82, 240 Ala. 73, 197 So. 87. The trial

tax provided for in the local act, *supra*, is similar in nature to the trial tax in the circuit court. I am of the opinion that a revenue tax cannot be remitted by the trial judge.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

February 21, 1949.

Hon. G. Virgil Nunn,
Superintendent of Education,
City of Fairfield,
Jefferson County,
Fairfield, Alabama.

Teachers—Schools.

When a teacher in the public schools of this State has served under contract in the same county or city school system for three consecutive years and is immediately thereafter re-employed in such county or city school system, such teacher has attained continuing service status, even though her original employment began with the second semester of a school year instead of the first semester of a school year.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of February 12, 1949, is as follows:

“As I understand the Teacher Tenure Law a teacher does not obtain permanent tenure status until she has taught three school years with a regular certificate and has been re-employed for the fourth year.

“Please give me an opinion at the very earliest possible date on the following situation:

“A teacher began work for the Fairfield City Board of Education at the beginning of the second semester, January 15, 1946, and has taught continuously since that date. Is this teacher on a continuous service status now, or will she attain this status if re-employed for the school year 1949-1950?”

The Teacher Tenure Law is found in Title 52, Sections 351-361, Code of Alabama 1940, as Sections 358 and 360 thereof have been amended,

respectively, by Act No. 410, General Acts 1945, page 646, and Act No. 411, General Acts 1945, page 646.

Our Supreme Court, speaking through Mr. Chief Justice Gardner, said of this law, as originally enacted:

"* * * The very laudable purpose of this Act was to insure to the teachers some measure of security in their important work and to free them, at least to a measurable extent from the 'vicissitudes of politics' or the likes or dislikes of those charged with the administration of school affairs.

"Such being the manifest purpose of the Act it should be liberally construed in favor of the teachers, who constitute the class designated to be its primary beneficiaries. * * *" **Board of Education of Marshall County v. Baugh**, 240 Ala. 391, 199 So. 822.

Title 52, Section 351, Code of Alabama 1940, defines teacher, as that term is employed in the Teacher Tenure Law, as a person regularly certificated by the teacher certificating authority of the State of Alabama who may be employed as an instructor, principal, or supervisor in the public elementary and high schools of the State of Alabama.

Title 52, Section 352, Code of Alabama 1940, the provision of the Teacher Tenure Law particularly pertinent to your inquiry, reads as follows:

"Teachers who may attain continuing service status.—Any teacher in the public schools, who shall meet the following requirements, shall attain continuing service status: (a) Such teacher shall have served under contract as a teacher in the same county or city school system for three consecutive years and shall thereafter be re-employed in such county or city school system. (b) Such continuing service status can be conferred only by the re-employment of such teacher for the school year beginning in the fall of 1940, or for some subsequent school year."

The question propounded in your inquiry is one of first impression, both with the courts of this State and this office. In answering the same, I will accord a liberal construction to the law, being ever mindful in so doing of its laudable purpose as stated by our Supreme Court, *supra*.

If Subsection (a) of Section 352, *supra*, were considered alone, it would be clear that the teacher described in your letter of inquiry has now attained continuing service status. However, when the provisions of Subsection (b) thereof are also considered, the matter is not entirely free from doubt. Because of the provisions of Subsection (b), it might be argued that the time to be considered in determining whether or not a teacher has served under contract for three consecutive years

must begin with the first semester of a school year, and that the re-employment thereafter must begin with the first semester of a school year, rather than with the second semester of a school year. To accord such effect to the provisions of Subsection (b) would require a teacher originally employed at the beginning of the second semester of a school year to do more in the way of continuous employment and re-employment to attain continuing service status than is required of a teacher originally employed at the beginning of the first semester of a school year. I am convinced that such was not the intention of the legislature, and that once a teacher has served under contract in the same county or city school system for three consecutive years and is immediately thereafter re-employed in such county or city system, he or she has attained continuing service status, regardless of the time when he or she was originally employed.

Accordingly, I advise you that the teacher described in your letter of inquiry has now attained continuing service status and is entitled to all the benefits of a teacher on continuing service status under the Teacher Tenure Law.

Any other construction would be contrary to the very laudable purpose of this law, and would amount to a construction of the same **against**, rather than **in favor of**, the teachers, who constitute the class designated to be its primary beneficiaries.

Strong support for the conclusion here reached is found in Quarterly Report of Attorney General, Vol. 48, page 27.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 21, 1949.

Hon. Herman K. Longshore,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

Officers and Offices—Office of Profit—County Administrator
—General Guardian.

1. One holding any public office carrying with it the exercise of a part of the sovereign power of the State, the salary, fees, or other compensation of which is fixed by law, holds an office of profit within the meaning of Section 280, Constitution of Alabama 1901.

2. One serving as County Administrator exercises no part of the sovereign power of the State and, therefore, does not hold an office of profit.

3. One serving as a General Guardian of a county exercises no part of the sovereign power of the State and, therefore, does not hold an office of profit.

4. One holding either or both of the above offices may lawfully be appointed to and serve as a member of the Civil Service Board of the City of Florence.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 8, 1949, is as follows:

"I hand you herewith a copy of an Act of Legislature creating a Civil Service Board and authorizing civil service regulations for Police and Fire Departments in Florence, Alabama.

"I call your attention specifically to the following provision found in Section three of the Act, 'No person shall be eligible to be a member of said board who holds any office of profit under the City, County or State.'

"Mr. A. M. Brown of Florence, Alabama, is County Administrator and General Guardian for Lauderdale County.

"Are they offices of profit rendering him ineligible to appointment to the civil service board. Please advise me on this point as soon as you can."

In my opinion, your inquiry must be answered in the negative.

It is provided by Act No. 437, Local Acts 1947, page 291, the act creating and establishing the Civil Service Board of the City of Florence, that:

"No person shall be eligible to be a member of said board who holds any office of profit under the City, County, or State."

Your inquiry, therefore, addresses itself solely to the question of whether one serving as a County Administrator or as General Guardian for a county holds an office of profit as such term is used within the Constitution and statute of this State. In my judgment, he does not.

The Supreme Court of the State has upon more than one occasion expressed its opinion as to the meaning of such term as used within Section 280, Constitution of Alabama 1901, the most frequently cited and quoted opinion being that found within the decision rendered in the

case of *State ex rel. Glenn v. Wilkinson*, 220 Ala. 172, 124 So. 211. It is there stated by the Supreme Court that:

"On further and more mature consideration, we are of opinion, and so hold, that any state, county, and municipal office, whether elective or appointive, carrying as a necessary incident to its exercise some part of the sovereign power of the state; the term and salary or perquisites of which are fixed by law, is an office of profit within the purview and meaning of section 280 of the Constitution of 1901. *State v. Sanders*, 187 Ala. 79, 65 So. 378, L. R. A. 1915A, 295."

I have only recently had occasion to consider the opinion of the Court in the above-cited case. In an opinion rendered to the Honorable Howell Turner, Chairman of the State Board of Pardons and Paroles, under date of January 20, 1949, I held that, in my judgment, a public office to be deemed an office of profit within the meaning of Section 280 of the Constitution need only be an office which carries with it some exercise of the sovereign power of the State, with the fees, salary, or other compensation granted the holder thereof being fixed by law. It is not necessary that such office carry with it a term prescribed and fixed by law.

Considering the two offices here concerned, i.e., County Administrator and General Guardian for the county, it is to be found that the former is provided for by Title 61, Section 134, Code of Alabama 1940, the duties of such office being prescribed within the statutes immediately following, with the provisions relative to fees and compensation being set out within Title 61, Sections 377-380, *supra*. From the above statutes, it may be seen that the person occupying such position does hold a public office, the fees or compensation of which are fixed by law. However, in my judgment, such person exercises no part of the sovereign power of the State, serving rather as an officer of the Probate Court, responsible to the heirs, assigns, or other beneficiaries of the estate for which he is serving as administrator. Such person's duties are little different from those of any other person appointed as administrator of an estate and his compensation for the performance of the duties associated therewith is precisely the same. I am, therefore, of the opinion that although such person holds a public office, the fees or compensation of which are fixed by law, such person fails to hold an "office of profit" within the meaning of Section 280, *supra*, for the reason that such person exercises no part of the sovereign power of the State, an essential requisite of an office of profit.

The same would be true of the office of General Guardian of a county. Such officer is appointed under the authority of Title 21, Section 7, Code of Alabama 1940, his duties being the same as those of any other person appointed as guardian. The compensation for the services performed in connection with such guardianships is provided for by Title 21, Section 143, *supra*. However, in my opinion, such person likewise exercises no part of the sovereign power of the State, being rather an officer of the Probate Court, responsible to such Court and to his

ward for the proper performance of his duties relative to any guardianship to which appointed. In no sense does such person exercise any part of the sovereign power of the State.

For the reasons above set out, I am of the opinion, and so hold, that one serving either as a County Administrator or as a General Guardian of a county, does not hold an office of profit within the meaning and purview of Section 280, *supra*, and is, therefore, eligible to serve as a member of the Civil Service Board of the City of Florence, if appointed thereto.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 21, 1949.

Honorable Frank Marion Orr, Chairman,
Board for Registration of Architects,
Lee County,
Auburn, Alabama.

Architects—Counties—Municipalities.

1. Municipality or county has authority to issue building permit on plans not drawn by registered architect if such plans meet local requirements.

2. Municipality or county may rightfully deny architect's privilege license when applicant is not registered with State Board for Registration of Architects.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of February 2, 1949, is as follows:

"The State Board for Registration of Architects has, from time to time, received complaints from registered architects of the state to the effect that certain people, who are not registered architects, are designing buildings costing in excess of the limitations provided in Section 9 of the Registration Act, and that permits for the erection of such buildings are being issued by City Building Inspectors.

"While the Board realizes its responsibility for carrying out the provisions of the Registration Act, there has been some attempt, in the past, to secure the assistance of various municipal authorities.

In several instances the provisions of the Registration Act (particularly Section 9) have been brought to the attention of persons charged with the issuance of building permits with the suggestion that permits may be denied in those cases where Section 9 of the Registration Act is clearly violated.

"It appears, however, that many municipal authorities are not clear in regard to what action they may rightfully take in such matters, therefore, I wish to ask for your opinion upon the two following questions:

"(1) Is it legal for a municipal authority to issue a building permit for a structure covered by Section 9 of the Registration Act, when such structure was or is not designed by a registered architect, or may such permit be rightfully denied?

"(2) Is it legal for a municipal or county authority to issue an architect's privilege license to an individual, partnership, or corporation where the individual, or the principals of the partnership or corporation have not qualified with the State Registration Board and are not registered architects, or may such license be rightfully denied?"

In my opinion, your first question should be answered in the affirmative.

I am of the opinion that a municipality or county may issue a building permit for any structure which meets the requirements of such political subdivision's building code or regulations. It is immaterial whether the plans for such structure were drawn by a registered architect or not, unless the political subdivision's building code or regulations require that they be so drawn. I find no State law requiring plans to be drawn by a registered architect as a prerequisite to issuance of a building permit by a municipality or county.

In answering your second question, I invite your attention to the following laws of the State of Alabama:

Title 46, Section 8, Code of Alabama 1940, as amended by Act No. 226, General Acts 1943, page 191, is as follows:

"Section 8. Qualification and Registration necessary for lawful practice.—In order to safeguard life, health and property no person shall practice architecture in this State, or use the title 'Architect' or any title, sign card or device to indicate that such person is practicing architecture or is an architect unless such person shall be registered as an architect as hereinafter provided and shall thereafter comply with the provisions of this Chapter."

Title 46, Section 18, Code of Alabama 1940, is as follows:

"§ 18. Unlawful acts and penalties.—Any person who is not legally authorized to practice as an architect in this state according to the provisions of this chapter and shall so practice or offer to so practice in this state, except as provided in the following section of this chapter, and any person presenting or attempting to file as his own the certificate of registration of another or who shall give false evidence of any kind to the board, or to any member thereof, in obtaining a certificate of registration, or who shall falsely impersonate another practitioner, of like or different name, or who shall use or attempt to use an expired or revoked certificate of registration, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than fifty dollars nor more than three hundred dollars."

In my opinion, these sections provide that no person, partnership, or corporation shall engage in the practice of architecture in this State unless such person, partnership, or corporation is duly qualified and registered by the State Board for Registration of Architects.

The State has seen fit to safeguard the life, health and property of its citizens by providing for certain standards to be met by those engaged in the practice of architecture. Certainly, no municipality or county has authority to lower or disregard those standards.

It is my opinion that a municipality or county authority may rightfully refuse to issue an architect's privilege license to any person, partnership, or corporation not duly registered with the State Board.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 21, 1949.

Hon. J. M. McLeod,
Judge of Probate,
Wilcox County,
Camden, Alabama.

Counties—Municipalities—Highways and Highway Department—Funds.

1. A county governing body may legally transfer any surplus in the general fund of the county to the road fund of the county, when there is sufficient money in the general fund, after such transfer, to pay all prior obligations against said fund at the time of transfer, the surplus so transferred to be used only for road and bridge purposes.

2. A county governing body, with the consent or permission of the governing body of any municipality, may establish, construct and maintain roads, streets or bridges within the corporate limits of such municipality, except in cases where the highway department has jurisdiction over such roads, streets or bridges.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of February 16, 1949, is as follows:

"I am writing to ask for an opinion on the following question:

"Can Commissioners Court appropriate funds from the General Fund to build a road in an incorporated town? My idea is that this cannot be done."

Specific statutory authority for the transfer, by a county governing body, of any surplus in the general fund of the county to the road fund of the county is found in Title 23, Section 47, Code of Alabama 1940, which reads as follows:

"Surplus from general fund of county transferred to road fund; use of gas tax funds.—The court of county commissioners, board of revenue, or other like governing body of any county in this state may transfer to the road fund of the county any surplus of the general funds of the county in the county treasury, or any part of such surplus whenever, in the judgment of such court or board, it will promote the interest of the county to make such transfer. Any surplus of the general fund so transferred shall be used only for the working of the public roads or the building of bridges or otherwise improving the roads of such counties."

However, such transfer may only be made when there is sufficient money remaining in the general fund, after the transfer, to pay all obligations against the general fund at the time of transfer, and the surplus so transferred may only be used for road and bridge purposes. Whether or not there is such a surplus in the general fund is a question of fact to be determined by correct accounting procedures. For opinions construing the above quoted statutory provision, your attention is invited to Quarterly Report of Attorney General, Vol. 16, page 262; Quarterly Report of Attorney General, Vol. 18, page 71; Quarterly Report of Attorney General, Vol. 38, page 35; Quarterly Report of Attorney General, Vol. 48, page 227. See, also, Biennial Report of Attorney General, 1936-38, page 472; Quarterly Report of Attorney General, Vol. 9, page 112; Quarterly Report of Attorney General, Vol. 17, page 325; and, Quarterly Report of Attorney General, Vol. 20, page 85.

There is also specific statutory authority for a county governing body, with the consent or permission of the governing body of any municipality, to establish, construct and maintain any road, street or bridge within the corporate limits of such municipality, except in cases where the highway department has jurisdiction over such road, street or bridge. Title 23, Section 49, Code of Alabama 1940, reads as follows:

“Road in municipalities.—The court of county commissioners or like governing body of any county, with the consent or permission of the city council or governing body of any municipality, may establish, construct and maintain any road, street or bridge within the corporate limits of such municipality, except in cases where the highway department has jurisdiction over such road, street or bridge.”

See opinion of the Attorney General to Hon. Frank O. Deese, Judge of Probate, Dale County, Ozark, Alabama, under date of January 17, 1949, a copy of which is enclosed for your information.

Specifically answering your inquiry, you are advised:

1. If there is a surplus in the General Fund of Wilcox County, the county governing body may transfer the same, or any part thereof, to the road fund of the county, to be used for road and bridge purposes.

2. Any money in the road fund of the county, including the surplus so transferred from the general fund, may be used by the county governing body to build a road in a municipality (incorporated town), provided the governing body of the municipality gives its consent or permission, and the road to be built is not under the jurisdiction of the highway department.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 21, 1949.

Honorable J. A. Roberts,
Superintendent of Education,
Henry County,
Abbeville, Alabama.

Schools—County Boards of Education.

1. Title to real property conveyed to school trustees for school purposes vests in county board of education under Title 52, Section 71, Code of Alabama 1940.

2. County board of education has no authority to mortgage school property to build home for superintendent.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of February 5, 1949, is as follows:

"I would like to have your official opinion at the very first opportunity, on the following inquiry,—to-wit:

"A good many years ago the Local Board of Trustees of the Henry County High School purchased a vacant lot adjacent to, and which now comprises a part of, the Campus of the Headland High School. The deed was executed to the Local Board of Trustees and their successors in office, and the property was paid for out of funds available to said Local Board of Trustees from sources other than taxation.

"The Local Board of Trustees of the Headland High School and the Henry County Board of Education, together with the Superintendent of Education, for Henry County, Alabama, now wishes to construct on this property a residence for occupation by the Superintendent of the Headland High School and Grammar School for a reasonable rent to be paid by him.

"It is the purpose of the School Authorities to procure a loan from F. H. A., if possible, to be repaid over a period of several years for the costs of the construction of this residence. I would like to know:

"1. If title to said property is vested in the Henry County Board of Education, by virtue of Section 71, Title 52, of the 1940 Code of Alabama, or other provision of law, notwithstanding the fact that said property was originally conveyed to the Local Board of Trustees.

"2. If the Henry County Board of Education, or the Local Board of Trustees of the Headland High School has authority to execute a mortgage on said real estate together with the improvements thereon situated, for the purpose of acquiring funds to construct a residence on said real estate so as to give the mortgagee a good and valid title in and to the property upon foreclosure of the mortgage in the event of default in the terms of the mortgage or the repayment of the debt secured thereby.

"3. If the Henry County Board of Education has authority to procure a loan from the F. H. A. and execute a valid mortgage on school real estate for the purposes of acquiring funds to erect a

residence on said property for occupation by school principal or teacher, and so as to vest a good and valid title in the mortgagee upon a legal foreclosure of the mortgage in the event of a default of the performance of its terms or the repayment of said loan."

In answering your first inquiry, I should like to call your attention to Title 52, Section 71, Code of Alabama 1940, which provides as follows:

"§ 71. Property vested in county board.—All the property, estate, effects, money, funds, claims, and donations now or hereafter vested by law in the public school authorities of any county for the benefit of the public schools of any county are hereby transferred and vested in the county board of education, and their successors in office. Real and personal estate granted, conveyed, devised or bequeathed for the use of any particular county, school district, or public school, shall be held in trust by the county board of education for the benefit of any such county school district or school."

In Quarterly Report of Attorney General, Volume 39, page 20, there appears an opinion which construes Section 95 of the School Code of 1927. Said section is codified without change in the Code of Alabama 1940 as Section 71 of Title 52. This opinion holds that title to real and personal property conveyed to school trustees for school purposes vests in county boards of education under Section 95, School Code of 1927 (Title 52, Section 71, Code of Alabama 1940). Therefore, it is my opinion that title to the land mentioned in your inquiry is vested in the Henry County Board of Education.

It is my opinion that your second question should be answered in the negative.

A county board of education is a quasi corporation, a governmental agency, created by law and endowed with certain rights and powers defined by statute, and, being a creature of statute, can exercise only those powers which are expressly conferred upon it, or necessarily incident thereto. *County Board of Education v. Slaughter*, 230 Ala. 229, 160 So. 758. Therefore, any authority to mortgage school property must be found in the statutes governing county school boards.

Title 52, Section 99, Code of Alabama 1940, defines the powers of the county board of education and provides as follows:

"§ 99. Powers of county board.—The county board of education shall have the right to acquire, purchase by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. It may sue and contract, all contracts to be made after resolutions have been adopted by the board and spread upon its minutes. All processes shall be executed by service on the executive officer of the board."

Title 52, Sections 198, 216, and 243, Code of Alabama 1940, provide for the borrowing of money by county boards of education and the pledging of anticipated revenues as security or the issuance of warrants payable from special taxes. None of these sections provide for the creation of a debt as contemplated in the instant case or the mortgaging of school property.

Your attention is invited to Biennial Report of Attorney General, 1930-32, page 751. This opinion construes Section 201 of the 1927 School Code, now Title 52, Section 161, Code of Alabama 1940. While Section 161, *supra*, deals with city boards of education, the powers enumerated therein, and in Title 52, Section 99, Code of Alabama 1940, are sufficiently similar to permit an analogy. The above cited opinion holds in part as follows:

"If it had been the legislative intent to authorize the mortgaging of school property for such purpose, it could have been done by adding one more word. The fact that the word 'mortgage' was left out, shows, in my opinion, that there was no intent of conferring the power; especially, when to do so would contradict what was said in beginning fixing the limitations of action.

"So far as the power to sell and the power to mortgage school property is concerned they are quite different. The power to sell was in order to dispose of property no longer needed for school purposes, while the power to mortgage might encumber property that is needed for school purposes. The power to sell unneeded property does not include the power to mortgage property needed for school purposes."

I find no authority in the laws of Alabama which would permit a county board of education to mortgage school property to raise funds for any purpose.

The conclusion reached in answering your second inquiry makes consideration of the third unnecessary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 21, 1949.

Honorable Charles W. Terry,
State Personnel Director,
CAPITOL.

Military and Naval Affairs—Merit System—State Employees.

Employees of the State service, who are members of reserve components of the armed forces of the United States and who

voluntarily enter upon extended active duty, are entitled to the military leave benefits provided for in Title 35, Section 12, Code of Alabama 1940, and the rules and regulations of the State Personnel Board. The character of entry upon active duty, whether voluntary or involuntary, has no bearing on the right of one to be the recipient of the benefits of the military leave provisions of our law.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of January 28, 1949, is as follows:

"Subject: Military Leave for State Employees

"Your attention is called to Title 35, Section 12, of the Alabama Code (1940), which reads as follows: 'All officers and employees of the State of Alabama, or of any county, municipality, or other agency or political subdivision thereof, who shall be active members of the Alabama national guard or naval militia, or of the officer's reserve corps of the United States Army, or of the United States naval reserves, shall be entitled to military or naval leave of absence from their respective civil duties and occupations on all days that they shall be engaged in field or coast defense or other training or on other service ordered under the provisions of this chapter, or of the national defense act, or of the federal laws governing the United States naval reserves, without loss of pay, time, efficiency rating, annual vacation, or sick leave, but no such person granted such leave of absence with pay shall be paid for more than twenty-one working days at any one time.'

"This code section has been amplified in Rule 11, Section 2d, of the Rules of the State Personnel Board (December 1947), as follows: 'Military Leaves: All employees in the State service, who shall be active members of the Alabama National Guard or Naval Militia, or of the reserve components of the Army, Navy, Marine Corps, Air Force, or Coast Guard shall be entitled to military or naval leave of absence from the respective civil duties and occupations on all days that they shall be engaged in field or coast defense or other training or on other services ordered under the provisions of the military laws of Alabama, or of the National Defense Act, or of the Federal laws governing the United States Naval Reserves, without loss of pay, time, annual vacation, or sick leave, but no such person granted such leave of absence with pay shall be paid more than twenty-one working days at any one time.'

"An amendment to this Rule, adopted by the State Personnel Board and approved by the Governor on August 24, 1948, provides

the following: 'If any regular employee of the State who is subject to be drafted under the Selective Service Act of 1948 and who has been in the State service three months or more is drafted or volunteers for the military service of the United States, he shall be allowed twenty-one working days military leave with pay. When such military leave is taken, the employee shall be entitled to accrued annual leave before beginning of military leave, but shall not earn any additional annual leave after actually leaving the State service for military service. Any advanced annual or sick leave still outstanding shall be deducted from the amount to be paid for military leave.'

"Since the end of the last war, it has been our interpretation that these laws and rules quoted above refer to employees who remain in the State service, but are necessarily absent from their State duties from time to time on military service because of their affiliation with the reserve components or the national guard. The amendment to the Rule relating to persons drafted under the 1948 Selective Service Act is, of course, a specific exception to this interpretation, approved by the State Personnel Board and the Governor. However, there has been several instances where employees who are members of one of the reserve components have gone on extended and indefinite active military duty. Since current federal laws governing the reserve does not usually permit the recall of a reserve officer or enlisted man to active duty without his consent, we have considered these cases to represent voluntary separation from the State service for the purpose of entering the military service for an indefinite time. In these cases we have, therefore, not allowed the payment of the twenty-one days military leave after the employee leaves the State service. We realize, of course, that even in these cases the former employee is entitled to the privilege of restoration to his former position as provided in Title 55, Section 316 (3) of the Alabama Code (1940), as amended.

"Your official opinion is requested as to whether or not we are correct in interpreting these laws so as to deny the privilege of military leave with pay to employees going on extended active military duty."

I am of the opinion that your inquiry should be answered in the negative.

Nowhere in Title 35, Section 12, Code of Alabama 1940, quoted in your letter of inquiry, or in rules and regulations referred to therein, are there any specific provisions, or even any inferences, which would make the granting of military leave conditional upon either voluntary or involuntary entry upon active duty (other than the exception in case of draftees) in the armed forces of the United States.

Title 35, Section 12, *supra*, in my opinion, does not make military or naval leave of absence, without loss of pay, therein provided, con-

tingent upon compulsory service. Service under a call pursuant to application, or with consent, is nevertheless service within the purview of said section.—Quarterly Report of Attorney General, Volume 21, page 34. The same is true of the rules and regulations referred to in your letter of inquiry.

Moreover, under the provisions of Act No. 651, General Acts 1939, page 1027, approved July 10, 1940, and Section 8 of Act No. 1, General Acts 1942, page 7, approved November 20, 1942, (Title 55, Section 316 (1)(2)(3)(4), Code of Alabama 1940—Cumulative Pocket Part 1947), employees in the service of the State do not lose their status by reason of service in the armed forces and are entitled to the privilege of restoration of former position within a year after the termination of such service. These acts contain no conditions or provisions relative to this service in the armed forces being voluntary or compulsory.

In view of the foregoing, I am of the opinion that entry upon extended or indefinite active duty by a member of a reserve component, though voluntary, could not be considered as a separation from the State service. I am further of the opinion that by such entry one would not be deprived of military leave benefits under the provisions of Title 35, Section 12, *supra*, or the rules and regulations in question. Extended active duty, though originally for an indefinite or stated period, may be terminated at any time through individual release or by changes in Federal policies.

To hold that one who volunteers for service in the armed forces is to be deprived of certain benefits, and those who are inducted or drafted on an involuntary basis are entitled to same, would not only be discriminatory but contrary to our conception of dutiful and patriotic citizenship. As heretofore stated, the character of entry upon active duty (whether through patriotic motives or by compulsion) has no bearing on the right of one to be the recipient of the benefits of the military leave provisions of our law.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 23, 1949.

Hon. Paul E. Saywell, President,
Board of Commissioners,
Colbert County,
Sheffield, Alabama.

Municipal Corporations—Recreational Boards.

1. A municipal corporation having a population of not more than 100,000 may create a recreational board under the provisions of Act No. 350, General Acts 1945, page 565.

2. Such recreational board may accept donations of real or personal property and the city may appropriate from its general fund a sufficient amount of money to the recreational board for the purpose of maintaining and improving properties owned by such board.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of December 7, 1948, is as follows:

"The Board of Commissioners of the City of Sheffield request your opinion in writing on the questions hereinbelow set out.

"The Sheffield YMCA-Community Center, a nonprofit corporation organized under the laws of the state of Alabama, has acquired a site and has spent a large sum of money erecting thereon the building which is known as Sheffield YMCA-Community Center. The corporation has expended the sum of approximately \$70,000 in erecting a building on this site for use as a community center, but lacks funds to complete the building and is offering to donate and convey this property to the City of Sheffield upon condition that the city complete the building and with the restriction that the building be used as a community center, a municipal auditorium, and a gymnasium, for the use and benefit of the public in Sheffield. The city estimates that the cost of completing the building would be approximately \$40,000.

"This Board of Commissioners is in doubt as to whether it may accept this property and then expend municipal funds in the completion of the building and thereafter operate the building for the purposes above stated.

"As shown in the resolution adopted by the board on December 7, 1948, a copy of which is hereto attached, the Board of Commissioners has instructed me to request your opinion in writing on these questions:

"(1) May the City of Sheffield accept the said unfinished building as a donation to the city and thereafter lawfully expend municipal funds in completing the said building?

"(2) Is the City of Sheffield authorized to spend municipal funds for the operation of said building as a community center, municipal auditorium, and gymnasium, for the use and benefit of the public in the city of Sheffield?

"I will appreciate a prompt reply to this request, since the said building in its unfinished condition is subject to serious damage by the winter weather and the offer being made to the city is conditioned upon its prompt acceptance."

In answer to your request, I deem it advisable to call your attention to Act No. 350, General Acts 1945, page 565.

This act provides that a municipality with a population of not more than 100,000 may create a recreational board for the purposes set out in said act. It is provided in Act No. 350, supra, that such board after it has been created by an ordinance duly adopted by the municipality may accept financial aid and grants from any public or private agency.

You are, therefore, advised that in accordance with Section 4 of Act No. 350, supra, the recreational board after it has been created by the municipal corporation of Sheffield may accept as a gift the Sheffield YMCA-Community Center property.

It is provided in Section 5 of Act No. 350, supra, that a municipal corporation may make appropriations from its general fund to the recreational board for the support and maintenance of the board, for the support and maintenance of recreational programs and improvements of recreational lands, buildings, equipment and facilities.

It, therefore, follows that if this recreational board is created by the City of Sheffield, then the City of Sheffield may appropriate funds from its general funds to this board for the purpose of completing the YMCA-Community Center property. If this be done, then this property may be used for the purposes outlined in your request.

I suggest that the above procedure be followed especially in view of the fact that the legislature has set out by Act No. 350, a comprehensive and complete method by which municipal corporations may acquire and maintain properties for the general benefit of the people of the community.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 23, 1949.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
CAPITOL.

Department of Archives and History—Libraries—Counties—
Appropriations—Municipalities.

1. An appropriation made to the Public Library Service Division of the Department of Archives and History for salaries may not legally be expended for aiding county and city libraries in the purchase of books.

2. An appropriation made to the Public Library Service Division of the Department of Archives and History for salaries may be expended to supplement salaries of county librarians.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of December 8, 1948, is as follows:

"During the examination of the records and accounts of the State Public Service Library Division of the State Department of Archives and History for the fiscal year 1946-47 and 1947-48 it was noted that a number of warrants were issued as an aid to salaries of librarians of certain County and City Libraries, which had qualified with the State Public Service Library Division for assistance from the State Library in securing additional books for the use of the Libraries.

"These warrants were made payable to the several county and city librarians as a salary payment, and in accordance with the Minutes of the State Public Service Library's Minutes of the Board meetings, these salary payments were made to the librarians in order that their libraries could expend the same amount as had been used for paying the librarians' salary, for the purchase of additional books.

"It was further noted that the reason the State Public Service Library did not furnish the books instead of paying the money to the library as a salary aid was because the appropriation allotted for books had been exhausted.

"For information the following appropriation was made the Public Service Library Division for the year 1946-47 as follows:

"For Salaries	\$17,500.00
For Other Expense.....	7,500.00
For Books & Pamphlets.....	25,000.00
For Salaries, Expenses, Books and Pamphlets, conditional upon the condition of the Treasury and the approval of the Governor.....	20,000.00

"There was an overage in the salary appropriation of approximately \$6,000.00 and the money expended as stated above was drawn from the item of salaries for the State Public Service Library Division as the other items were exhausted. Therefore, your official opinion is respectfully requested:

"1. As to whether this overage in appropriation for salaries could be legally expended for aiding the County and City Libraries in the purchase of books for the libraries?

"2. Can an appropriation made to State Public Service Library Division of the State Department of Archives and History for salaries be used to supplement salaries of County Librarians?"

The General Revenue Act of 1945 (Act No. 145, General Acts 1945, page 163), and the General Revenue Act of 1947 (Act No. 320, General Acts 1947, page 183), make appropriations to the Public Library Service Division of the Department of Archives and History for specific purposes, one of which purposes is "For salaries." Both of these Acts contain the following provision:

"That the appropriations herein made, except appropriations to eleemosynary institutions and to the Alabama Institute for Deaf and Blind, are and shall be subject to the terms, conditions, provisions, and limitations of the Budget and Financial Control Act."

Title 55, Section 106, Code of Alabama 1940 (one of the provisions of the Budget and Financial Control Act), provides in part as follows:

"It shall be unlawful for any trustee, commissioner, director, manager, building committee, or other officer or person connected with any department, institution, bureau, board, commission or other state agency, to which an appropriation is made, to expend any appropriation for any purpose other than that for which the money was appropriated, budgeted and allotted, or to consent thereto."

Answering your first inquiry, it is my opinion that any "overage" in the appropriation made to the Public Library Service Division of the Department of Archives and History for salaries may not legally be expended for aiding county and city libraries in the purchase of books. Cf. Quarterly Report of Attorney General, Vol. 19, page 286.

Title 55, Section 278, Code of Alabama 1940, is as follows:

"In order to aid in the development of higher ideals of citizenship and the enlargement of opportunity for culture and recreation, and in order to afford an additional means for the further upbuilding of the educational facilities of the state, there shall be a public library service division in the department of archives and history, which shall have as its chief objective the development of a cooperative system of providing books and library service for the various cities and counties of the State." (Emphasis supplied.)

It will be seen from the above section that the chief object of the Public Library Service Division is to develop a cooperative system of providing books and library service for the various cities and counties of the State.

It is my conclusion that the term "library service" as used in Section 278, supra, is broad enough in its scope to include the service of aiding counties in paying the salaries of county librarians. It is, therefore, my opinion that an appropriation made to the Public Library Service Division of the Department of Archives and History for salaries may be expended to supplement salaries of county librarians.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 24, 1949.

Hon. Ira L. Pritchett,
Clerk, Circuit Court,
Marshall County,
Guntersville, Alabama.

Clerks of Circuit Courts—Costs and Fees—Trial Fee.

1. Unless defendant is convicted, the court is without power to tax costs against him.

2. Clerk of circuit court is entitled to collect trial fee when defendant pleads guilty.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of February 17, 1949, is as follows:

"I know that various fees cannot be taken from the Fine and Forfeiture Funds, however upon the Court order of a failed case such as Nolle Prossed, Discharged, Dismissed or any other manner of failure to convict the defendant and the Court orders that the defendant should pay the Clerk and Sheriff fees, would it be permissible to tax in the fees against the defendant the following:

1. Trial fee. To Clerk.
2. Entering Judgment. To Clerk.
3. Entering Sentence. To Clerk.
4. Seizure fees in V. P. L. cases to Sheriff.
5. Mileage in all cases to Sheriff.
6. Issuing and serving Subpoenas for the defendant's witnesses, both Clerk and Sheriff.

"In the event a defendant plea guilty and is assessed a fine and cost should the trial fee be taxed against the defendant."

In answer to your first inquiry, you are advised that the court is without authority to order that the defendant pay clerk's and sheriff's fees, unless the defendant is convicted. In other words, when the charge is nolle prossed, the defendant is discharged, or the case is dismissed, the court has no authority whatsoever to require the defendant to pay court costs. *Melton v. State*, 30 Ala. App. 16, 1 So. 2d 920.

In my opinion, the fact that a defendant pleads guilty does not preclude the court from taxing a trial fee in the amount of fifty cents as provided for in Title 11, Section 89, Code of Alabama 1940. The clerk is entitled to this fee, depending on whether or not there was a trial. See Quarterly Report of Attorney General, Vol. 21, page 100. It is my opinion that even though a defendant pleads guilty, he has a trial within the meaning of Title 11, Section 89, Code of Alabama 1940. See Quarterly Report of Attorney General, Vol. 18, page 161, 163.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 24, 1949.

Hon. John M. Gallalee, President,
University of Alabama,
University, Alabama.

State Funds—Collateral Security thereof.

Where State funds in an amount not in excess of \$5,000 are on deposit in a bank and such bank is a member of the Federal

Deposit Insurance Corporation, such funds need not be collaterally secured in that amount.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of August 11, 1948, is as follows:

"The University of Alabama maintains University Centers in the Cities of Birmingham, Mobile, Montgomery, and Gadsden.

"For the convenience of these operations the University has on deposit in each of these cities in banks that are designated state depositories and also members of Federal Deposit Insurance Corporation certain funds. In no case do these respective deposits exceed \$5,000.00.

"The University has not heretofore required collateral security for these deposits, but the University does require collateral security to match deposits in depository banks carrying large balances of University funds.

"At the direction of the Executive Committee of our Board of Trustees, I respectfully request your official opinion as to whether or not the University is complying with the law in not requiring each bank with which it has the small deposits (less than \$5,000) to escrow Alabama or United States bonds to secure the deposits."

My answer to your inquiry is in the negative.

In this regard, your attention is directed to Title 5, Section 157, Code of Alabama 1940, which reads as follows:

"§ 157. Effect on local law requiring security. Notwithstanding any provision of law of this state or of any political subdivision thereof requiring security for deposits in the form of collateral, surety bond or in any other form, security for such deposits shall not be required to the extent said deposits are insured under the provisions of section 12 B of the federal reserve act, as amended, or any amendment hereto."

It is to be specifically noted from the above-quoted section that the Legislature has relieved those banks who are members of the Federal Deposit Insurance Corporation from the duty of collaterally securing State deposits up to and including the amount for which such deposits are insured under the provisions of Section 12 B of the Federal Reserve Act as amended.

It, therefore, follows that insofar as the University of Alabama does not have on deposit to the credit of the various University Centers an amount not exceeding \$5,000.00, such sum need not be collaterally secured as is required where State deposits exceed \$5,000.00.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 24, 1949.

Hon. Roy L. Stone, Chairman,
Board of Commissioners,
Madison County,
Huntsville, Alabama.

Courts of County Commissioners—Board of Registrars—Madison County.

The Board of County Commissioners of Madison County is without authority to appropriate money for the purpose of purchasing equipment or supplies for the Board of Registrars of such county.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 17, 1949, is as follows:

"The Madison County Board of Registrars have requested that the Board of County Commissioners of Madison County appropriate approximately \$3,500.00 for the purpose of purchasing for the use of the Board of Registrars certain equipment and supplies. This equipment and supplies would consist of filing cabinets, tables, and a cardex type filing system, with the purpose in mind of facilitating the registrars' duties and insuring accuracy of same.

"The Board of Commissioners desires to be informed as to whether they have any authority under the laws of Alabama, in any way, to make such appropriation for equipment and supply purchases."

In my opinion, your inquiry must be answered in the negative.

As is well known, Courts of County Commissioners, Boards of Revenue, or other like governing bodies of the various counties are courts of strictly limited jurisdiction, and can exercise only such powers as are conferred upon them by statute. Such being the case, it would be

necessary, in order to authorize the expenditure to which you refer in your request for opinion, that there exist some provision of law authorizing directly, or by strong implication, the expenditure in question. Reviewing the statutes pertaining both to the county governing body of Madison County and to the Board of Registrars, I fail to find any such authority. Cf. Quarterly Report of Attorney General, Volume 17, page 197. Neither do I find within such statutes any provision which I consider to vest in such governing body the implied power to make such an expenditure. For an excellent treatment of the law in this particular regard, together with numerous citations of authority pertinent thereto, I would call your attention to the former opinion of this office found reported in Quarterly Report of Attorney General, Volume 23, page 204.

Moreover, it is my opinion, from a consideration of the statutes pertaining to the Board of Registrars, that the framers of those statutes contemplated and made provision only for those supplies furnished such Board under the authority of Title 17, Sections 37, 49 and 50, Code of Alabama 1940. These include registration books, blank forms of oath, certificates of registration and notices. These are furnished to the various boards by the Secretary of State, at the expense of the State. I find no other statutes making provision for the furnishing of supplies, equipment, etc., to the Board of Registrars.

In view of the above, I can only conclude that the county governing body of Madison County is without authority to lawfully appropriate money for the purpose of purchasing equipment and supplies for the Board of Registrars of such county.

In giving answer to your inquiry, I have considered the provisions of the local act, together with the several amendments thereto, establishing and prescribing the authority of the Board of County Commissioners of Madison County, and I find nothing therein inconsistent with the conclusion above expressed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 28, 1949.

Hon. J. M. Hobbie,
Tax Collector,
Montgomery County,
Montgomery, Alabama.

Taxation—Municipal Taxes.

1. Tax collector should include in tax docket taxes due municipalities which have duly adopted the optional method of

collecting taxes pursuant to the provisions of Title 37, Sections 700-732, Code of Alabama 1940.

2. Judge of probate should include in decree of sale municipal taxes as well as state and county taxes when such municipality has duly adopted the optional method of collecting taxes pursuant to the provisions of Title 37, Sections 700-732, Code of Alabama 1940.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of February 2, 1949, is as follows:

"Sometime last summer, the City Commission of Montgomery, Alabama, passed an ordinance authorizing me to collect City taxes. Please advise me with reference to Title 51, Section 258, about the decree of sale for State, county and City taxes, and also advise me if I can put on my delinquent tax docket State, County and City taxes.

"I would appreciate it if you would give this your prompt attention, as these notices will have to go out in the next thirty (30) days."

Your inquiry calls for a consideration and discussion of the general subject of the assessment and collection of municipal taxes by the county tax assessor and collector, including the sale of property for non-payment of said taxes, pursuant to the provisions of Section 201 of the 1935 Revenue Act, as amended by Act No. 57, General Acts 1939, page 67, approved February 27, 1939, now incorporated in Title 37, Sections 700-732, Code of Alabama 1940.

A reading of Title 37, Sections 700-732, *supra*, clearly reveals that these statutes clearly contemplate the use of the state machinery in the matter of assessment and collection of municipal taxes. Thus, we find that any municipal corporation in this state may, by ordinance duly adopted, provide for the assessment and collection by county officials of taxes due such municipality. We also find from a reading of these statutory provisions that all the machinery provided for by the Code for the assessment and collection of state and county taxes, as well as the enforcement of such collections and the sale of property for the collection of taxes, shall be applicable to the assessment and collection of such municipal taxes.

You specifically ask the question of whether you can include in your tax docket municipal taxes as well as state and county taxes. I am of the opinion that your inquiry must be answered in the affirmative. Your attention is invited to the express provisions of Title 37, Section 717, Code of Alabama 1940, which reads as follows:

"§717. Tax collector's docket.—The county tax collector shall embrace in the docket of lands made by him under the provisions of law in regard to state and county taxes the amounts due such municipalities both from known and unknown owners in the county, if any, in the same manner and way as he is required to do in regard to state and county taxes giving the name of the municipality to whom due, and stating the municipal tax year for which the taxes are due, and in such manner and way as to show respectively the amounts of taxes due the state, the amounts due the county and the amounts due such municipalities chargeable against the respective properties."

Title 51, Sections 250 and 251, Code of Alabama 1940, require the tax collector to keep a docket book of delinquent taxes for delivery to the judge of probate on or before the first of March.

In the case of *City of Opp v. Brogden*, 236 Ala. 180, 181 So. 752, the Supreme Court of Alabama held that the tax collector, in making such report of delinquent taxes to the judge of probate, should keep separate and distinct the amounts due as city taxes and the costs and charges incident thereto from those due the state and county. I add this caveat for your guidance in the preparation of the tax docket as you are required by law to so prepare and present to the probate judge.

You further ask my opinion with reference to Title 51, Section 258, supra, as applied to the decree of sale for state, county and city taxes. In answering this inquiry you are advised that the notice to be given delinquent taxpayers by the probate judge (prior to entering a decree ordering a sale of the property) as required by Title 51, Section 252, supra, will suffice for all purposes if the form of such notice is in accordance with the form as prescribed in Title 51, Section 252, supra. See *City of Opp v. Brogden*, supra.

Title 51, Section 258, supra, provides for the issuance of the decree of sale of such property by the judge of probate, and Title 37, Section 718, supra, specifically provides for the inclusion in said decree of sale taxes due such municipalities. Section 718, supra, reads as follows:

"§718. Decree for tax sale.—The decree for tax sales rendered by the probate judge under the provisions of law in regard to state and county taxes shall embrace taxes due to such municipalities, showing the aggregate amount due to the state, county and municipality and showing what amount is for the municipality and the tax year of the municipality for which the same is due it."

However, in the decree ordering a sale of the property the probate judge should separately list the amount of any taxes due the city so that the same may be readily distinguished from the taxes due the state and county. See *City of Opp v. Brogden*, supra.

In closing, your attention is further invited to the explicit provisions of Title 37, Section 721, supra, which cast upon the judge of probate the duty of conveying by deed the lien of the municipality:

"§721. Execution of tax deed.—The judge of probate of the county in executing a tax deed to a purchaser, under the provisions of law in regard to state and county taxes shall by the deed convey to and vest in the grantee the lien and claim of such municipality as well as the lien and claim of the state and county."

In conclusion, I would like to invite your attention to the following former rulings of this office dealing with the subject matter at hand: Quarterly Report of Attorney General, Vol. 19, page 82; Quarterly Report of Attorney General, Vol. 15, page 231; Quarterly Report of Attorney General, Vol. 17, page 170; Quarterly Report of Attorney General, Vol. 17, page 363; Quarterly Report of Attorney General, Vol. 19, page 6; and Quarterly Report of Attorney General, Vol. 18, page 386.

I am sure that these former opinions will answer many of your inquiries which will undoubtedly arise in pursuance of your duties in regard to the collection of taxes due municipalities.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 2, 1949.

Hon. Paul J. Hooten,
City Attorney,
City of Roanoke,
Randolph County,
Roanoke, Alabama.

Licenses—Taxis—Municipal Corporations—Title 37, Sections 735, 746, Code of Alabama 1940—Act No. 669, General Acts 1939, page 1064.

1. Taxi operations between an incorporated city or town of less than 5,000 inhabitants and other points in Alabama are limited to a municipal license of \$25.00 under Act No. 669, General Acts 1939, page 1064.

2. Taxi operations strictly within a municipality are subject to such municipal licenses as the municipality sees fit to impose, and the amount of license may be attacked only if it is manifestly unreasonable or arbitrary.

3. The two phases of taxi operations above noted are separate and distinct and municipal licenses may be levied in either or both instances according to the facts of each case.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of February 2, 1949, is as follows:

"As City Attorney of the City of Roanoke, Alabama, I am asking for a ruling on the following inquiry:

"Does Section #746 of Title 37 of the 1940 Code of Alabama control the licensing power of municipalities of the State of Alabama, to the extent that municipalities under 5000 population cannot have general license of taxis over and above the amount of \$25.00 of license?

"Some of the taxi operators here in the city seem to think that the stated limitation will apply to them.

"I have ruled that there is no limit to what a city the size of Roanoke can charge taxis—at least in so far as it is reasonable.

"Of course, taxis here operate mostly within the city and police jurisdiction, though most of the taxis have permits to operate within a radius of 25 miles from the city of Roanoke and so obtained from the Public Service Commission of this state.

"I would be pleased to have your answer to the above inquiry."

Title 37, Section 746, Code of Alabama 1940, to which you refer, has been supplanted, in my opinion, by Act No. 669, General Acts 1939, page 1064, Section 31.

You will note that Title 37, Section 746, Code of Alabama 1940, to which you refer, is taken from a 1932 Act, viz., Act No. 159, General Acts 1932, Extra Session, page 178. Act No. 669 of the 1939 Legislature relates to the same subject and was approved July 5, 1940. It is thus the latest expression of the Legislature on the subject. It is well settled law in this state that the last expression of the Legislature is the law in case of conflicting statutes on the same subject. *Middleton v. General Water Works and Electric Corporation*, 149 So. 351, 25 Ala. App. 455, cert. den. 149 So. 352, 227 Ala. 219.

Act No. 669 is thus to be considered as the prevailing law on the subject and it is observed that Section 31 thereof reads in pertinent part as follows:

"Any incorporated city or town in this state shall have the right by proper ordinance to tax and collect reasonable privilege licenses or taxes from any motor bus terminal or any person operating any terminal or station facilities for transportation of passengers, property or express, transported by motor carrier, and any motor carrier as defined by this article where such motor carrier does business in said city or town by receiving passengers or freight for transportation for hire between said city or town and another point in Alabama, provided, however, that said privilege license or tax shall not exceed the sum of \$25.00 in incorporated cities or towns of less than 5,000 inhabitants. * * *." (Emphasis supplied.)

The term "motor carrier" is defined by Section 1 of the same Act as both a common carrier by motor vehicle and a contract carrier by motor vehicle, and thus includes a taxi.

A careful reading of the statute reveals that the coverage of the \$25.00 limitation of municipal licenses on taxis in cities or towns of less than 5,000 inhabitants is directed only to those taxis operating between a city or town "and another point in Alabama." Therefore, a municipal levy is authorized on such a phase of taxi operation with the limitation of \$25.00 applicable thereto. However, such applicability of the \$25.00 limitation relates only to such a phase of taxi operation that is between a town or city and "another point in Alabama."

The statute is silent on any license limitation of taxi operation strictly within the municipal limits of a city or town, and therefore it is my opinion that a municipality has a right to impose a municipal taxi license on this latter mentioned phase of taxi operation under the general authority given by Title 37, Section 735, Code of Alabama 1940. This statute gives the municipality the discretionary right to fix the amount of license on businesses, trades, professions, etc., without specific limitation and said enactment has been in effect since 1909. Cases on point appear to attack the amount of license fixed under the authority of this statute only when the municipality has manifestly abused its power thereunder. See *American Bakeries Company v. City of Huntsville*, 168 So. 880, 232 Ala. 162, and cases cited therein.

It is therefore my opinion that (1) an incorporated municipality with less than 5,000 inhabitants may impose a municipal license on taxis operating between the municipality and "another point in Alabama" in an amount not exceeding \$25.00, and (2) a municipality has the right to impose a municipal license on taxis operating strictly within the municipal limits in such amount as the municipality sees fit, so long as the amount is not manifestly unreasonable or arbitrary.

It may be that a taxi operation involves only one of the aforementioned operations. Such cases are for factual determination and the municipal license is applicable accordingly.

On the other hand, it may be that a taxi operation involves both phases of operations noted, and in such cases it is my opinion that both the municipal licenses referred to may be imposed.

It is clear to me that the Legislature had two separate and distinct phases of taxi operations in mind when legislation on point was enacted, and I am of the opinion that two separate and distinct municipal licenses may be levied to cover each phase of taxi operation when a factual determination substantiates such a situation.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 2, 1949.

Messrs. Ward and Ward,
County Attorneys,
Tuscaloosa County,
612-617 Alston Building,
Tuscaloosa, Alabama.

Constitutional Amendments — Governor's Proclamation —
Counties—Municipal Corporations.

Title 12, Section 132, Code of Alabama 1940.

1. Cost of publication of Governor's proclamation concerning election upon those proposed amendments applicable to one county alone is chargeable to the individual county concerned.

2. The cost of publication of the proclamation pertaining to an amendment affecting any county as a whole is to be borne by the county concerned, even though the provisions of such amendment may incidentally affect a municipality of the county, and the municipality is not required by law to pay a portion of such expense.

Opinion by Assistant Attorney General Hardin.

Dear Sir:-

Your request for an official opinion, bearing date of January 20, 1949, is as follows:

"In Re: Statement of Department of Finance against Tuscaloosa County for expenses incurred in connection with the Constitutional Amendment No. Four.....		\$4,407.93
Expenses incurred in connection with the Constitutional Amendment No. Five.....		25.39
		\$4,433.32

"On or about December 22, 1948, you wrote an opinion addressed to Hon. John Graves, State Comptroller, in which you reached the conclusion that the expenses incurred in the adoption of Amendment Number Four on or about November 2nd, 1948, in the amount of \$4,407.93 should be paid by Tuscaloosa County and in this same opinion you stated that the County should also pay its share of the expense in the sum of \$25.39 incurred in connection with Amendment Number Five.

"This bill in the sum of \$4,407.93 for expense incurred in connection with Amendment Number Four was presented to Tuscaloosa County some few days ago together with a copy of your opinion dated December 22nd, 1948. This bill for this sum together with your opinion was referred to us. We have again read carefully Amendment Number Four and we find that this Amendment was as much for the benefit of the City of Tuscaloosa as it was for Tuscaloosa County.

"The City of Tuscaloosa is in School District Number Three and substantially all of School District Number Three is in the City of Tuscaloosa. This Amendment Number Four provided that the funds derived from the five mill tax (if voted) were to be expended as follows:

"The funds arising from the special school tax to be levied hereunder and to be collected therefrom shall be expended for public school purposes for the exclusive benefit of the school district in which collected with all such tax collected in the City of Tuscaloosa to be expended in the City of Tuscaloosa. After said tax has been voted, and without further authorization or authority, as and when requested by the Board of Education of the City of Tuscaloosa, the City of Tuscaloosa shall issue and sell interest bearing bonds with principal and interest to be paid from the funds to be derived from the special school tax hereby levied in the City of Tuscaloosa and in the school district in which the City of Tuscaloosa is located, for the sole purpose of the construction and improvement of school buildings and the acquiring of sites therefor; provided, said net proceeds of said bonds shall immediately be paid to the Board of Education of the City of Tuscaloosa and said bonds shall not be issued for a longer period than thirty years, and said funds to be derived from said special school tax may be pledged by the City of Tuscaloosa for the payment of said bonds and the interest thereon, and provided that said bonds shall not be a general obligation of the City of Tuscaloosa or of Tuscaloosa County and shall not be charged to the Constitutional debt limit of the City of Tuscaloosa or of Tuscaloosa County. After said tax has been voted, and without further authorization or authority, as and when requested by the Board of Education of Tuscaloosa County, Tuscaloosa County shall issue and sell interest bearing bonds with principal and interest to be paid from the funds to be derived from the special school tax hereby levied in each school district in Tuscaloosa County, other

than in the City of Tuscaloosa and the school district in which the City of Tuscaloosa is located, for the sole purpose of the construction and improvement of public school buildings and the acquiring of sites therefor; provided the net proceeds of said bonds shall immediately be paid to the Board of Education of Tuscaloosa County and that said bonds shall not be issued for longer than thirty years and said funds arising from said school tax may be pledged by Tuscaloosa County for the payment of said bonds and interest thereon and provided that said bonds shall not be a general obligation of Tuscaloosa County and shall not be charged to the Constitutional debt limit of Tuscaloosa County.'

"In our judgment this Amendment Number Four was as much or more for the benefit of the City of Tuscaloosa than Tuscaloosa County.

"In our judgment the City of Tuscaloosa should pay its share of the expenses incurred with the said Amendment Number Four.

"This Amendment Number Four very definitely provides that all of the proposed tax collected in the City of Tuscaloosa was to be expended in the City of Tuscaloosa and also provided that the proceeds of the bonds issued for the district in which the City of Tuscaloosa is located should be turned over to the Board of Education of the City of Tuscaloosa.

"We have been requested by the Board of Revenue of Tuscaloosa County to write you and get your opinion as to whether or not the City of Tuscaloosa should pay a share of the said expense of \$4,407.93.

"In our judgment Section 132 of Title 12 of the 1940 Code of Alabama makes the City of Tuscaloosa liable for its pro rata share of said expense. This proposed amendment was certainly as much or more for the benefit of the City of Tuscaloosa than the other two districts.

"It is most probably true that the greater portion of the assessed value of the property of Tuscaloosa County is located in the City of Tuscaloosa and in School Tax District Number Three, which was comprised mostly of property located within the corporate limits of the City of Tuscaloosa.

"If you desire further information about this inquiry, please write us at your convenience."

It is my opinion that your inquiry should be answered in the negative.

As I understand and interpret the provisions of Title 12, Section 132, Code of Alabama 1940, they are to the effect that whenever a proposed constitutional amendment affects only a county or a subdivision thereof, such county shall be required to pay the expense of the publication of the Governor's proclamation concerning election upon such amendment. Further, that whenever the provisions of any proposed constitutional

amendment are applicable only to a designated municipality of the State, such municipality shall be required to pay the cost referred to above. It is my construction of such statute that it is the intent thereof that whenever any proposed constitutional amendment affects a county as a whole, or any designated portion or subdivision of said county other than a municipality thereof, that the cost of the publication of the Governor's proclamation concerning election thereon should be borne by the county. This, in my judgment, would be true even though the provisions of such amendment might in some manner incidentally affect a municipality located within the county, or the subdivision concerned. I find nothing within such statute supporting the theory that whenever an amendment, county-wide in scope and effect, incidentally affects a municipality of a county, that a portion of the cost here in question should be borne by the municipality, or the municipalities, so affected, it rather being my judgment that under such circumstances the terms of such statute place responsibility for the payment of such cost squarely upon the county concerned.

Considering now that amendment here in question, which amendment was proposed by Act No. 272, General Acts 1947, page 115, and listed upon the November 2nd ballot as Amendment No. 4, it will be seen that the provisions of such amendment are county-wide in their scope and effect and apply to Tuscaloosa County as a whole, and each and every school district thereof, including that school district in which the City of Tuscaloosa is located. It is true that the City of Tuscaloosa is specifically mentioned throughout such amendment, no doubt for the reasons stated by you in your request, that is, that the City comprises the great part of the school district in which it is located, and likewise that a large portion of the taxable property of the county is located within the City. However, it should be noted that wherever mention is made of the City, it is, in almost all cases, in conjunction with the school district in which located.

It is likewise of interest to note the language employed by the Legislature in providing for the election upon such proposed amendment, it being stated that the following should appear upon the ballot:

"Shall the following amendment, applying only to Tuscaloosa County, be adopted, to-wit:

"TUSCALOOSA COUNTY SPECIAL SCHOOL TAX:"

(Emphasis supplied.)

The above strongly supports the contention that the provisions of such amendment are county-wide in scope and effect, and would serve to refute any contention that the Legislature deemed such amendment as particularly applicable to any one municipality of the county. No doubt some benefit will accrue to all of the various municipalities of Tuscaloosa County, though to a lesser degree than to the City of Tuscaloosa, whose contribution in revenue would undoubtedly be higher by virtue of the

fact that a greater portion of the taxable property of the county is located therein.

It is my judgment that considering the amendment proposed by Act No. 272, supra, either in its entirety or the specific provisions thereof, it is apparent that it is principally directed toward Tuscaloosa County as a unit, affecting such county as a whole, and that any effect upon the City of Tuscaloosa is incidental to the main objectives of such amendment.

It is therefore, my opinion that the cost of publication of the Governor's proclamation concerning the election upon such amendment should be borne by Tuscaloosa County, and that the City of Tuscaloosa is not required by law to pay a portion thereof.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 2, 1949.

Dr. D. G. Gill,
State Health Officer,
Department of Health,
CAPITOL.

Health and Health Department—Birth Certificates—Infants—
Title 22, Section 33, Code of Alabama 1940, as amended by
Act No. 492, General Acts 1943, page 454—Title 27, Section 10,
Code of Alabama 1940.

1. State Registrar of Vital Statistics is not authorized by law to include the name of the father in the issuance of a birth certificate for a child born illegitimately until sufficient proof of legitimation is furnished.

2. State Registrar of Vital Statistics is not authorized by law to enter any information relative to the father of a child born illegitimately until sufficient proof of legitimation is furnished.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of February 10, 1949, is as follows:

"Section 33, Title 22, 1940 Code of Alabama, as amended, authorizes the State Registrar to prepare a proper birth certificate when he has received proof of legitimation. Sections 10, 11 and 12 of

Title 27 of the 1940 Code set forth the conditions and requirements which must be met to accomplish legitimation. It is specifically stated in these conditions that recognition of paternity by the reputed father is indispensable.

"It will be appreciated if you will give your opinion as to whether the attached true copy of a court decree is valid and sufficient to authorize the State Registrar of Vital Statistics to issue a new birth certificate to show the items specified in numbered sections 5 and 6 of the court decree."

In order to properly answer your request for an official opinion, it is considered necessary to first summarize the factual aspects of the case as they are revealed in the copy of the decree of Circuit Court of Madison County which you have attached to your letter of request.

This decree of Circuit Court results from a bill of complaint filed in equity, wherein the complainant (wife and mother) seeks funds from her respondent husband for the support and maintenance of their infant child. The child was born out of wedlock, the father and mother later marrying. At some time after marriage the husband and wife separated and the husband now denies that he is the father of the child.

The Circuit Court, after hearing the cause, found in its decree that the respondent was the father of the child in question and ordered that he contribute certain funds weekly to the support and maintenance of the child.

The court further held that the child should not be considered legitimized for purposes of inheritance from the father, but ordered by Item (5), which you refer to, that the State Registrar of Vital Statistics prepare a new birth certificate showing thereon that the respondent is the father of the child and further ordering by Item (6), which you refer to, that the State Registrar of Vital Statistics file a copy of the Circuit Court decree as information relating to the matter.

Under the facts thus summarized, it is my opinion that the proof outlined in the court decree is not sufficient to authorize the State Registrar of Vital Statistics to issue a new birth certificate naming thereon the respondent as the father of the child, and further that he is without authority to file a copy of the court decree as information relating to the matter.

Title 22, Section 33, Code of Alabama 1940, as amended by Section 8 of Act No. 492, General Acts 1943, page 454, reads in relation to the issuance of birth certificates as follows:

"* * If the child is illegitimate no information relative to the father shall be entered. Any physician or other person who attends an illegitimate birth may file the certificate of such birth directly with the state registrar of vital statistics, but such certificate must

be filed with said official not later than the first of the month immediately succeeding the month of birth. In cases of legitimation in the manner prescribed by law the state registrar upon receipt of a proof thereof shall prepare a new certificate of birth in the new name of the legitimated child. The evidence upon which the new certificate is made and the original certificate, if any, shall be sealed and filed. * * *"

It can be seen from the above statutory wording that a determination must be made as to whether or not a child coming within the coverage of the statute is legitimate or illegitimate. If the child is illegitimate, no information relative to the father can be filed. If an illegitimate child is later legitimized there must be proof thereof. The Circuit Court decree, while finding that the respondent is the father of the child, said child being born out of wedlock, fails to affirmatively find that the child has been legitimized in the manner prescribed by law.

In the latter regard, Title 27, Section 10, Code of Alabama 1940, reads as follows:

"The marriage of the mother and reputed father of a bastard child renders it legitimate, if recognized by the father as his child."

Cases interpreting this statute have consistently held that recognition by the father that a child is his is essential to legitimation. *Lingen v. Lingen*, 45 Ala. 410, 414; *Moore v. Terry*, 124 So. 80, 220 Ala. 47. While further holding that recognition must be unambiguous and clear in character, cases on point have held that recognition is established by the father's treatment of the child. *McBride v. Sullivan*, 45 So. 902, 904, 155 Ala. 166.

Thus the matter of determining whether or not a child born out of wedlock has become legitimized by subsequent marriage involves an essential finding of fact that the father has recognized the child as his own. In the instant case the court has made no such finding and the only factual statement on point is that the respondent father now denies that he is a parent of the child. It is my opinion that once a father, under the above statute, has recognized a child as his own after subsequent marriage, the child is at such time legitimized and a later denial could not refute this status. To construe the statute otherwise might result in a situation whereby the child would be held legitimate one day and illegitimate the next at the whim of the father's recognition.

Under these stated interpretations, it is my opinion that the court decree, because of an absence of finding in the above regard, is not sufficient to authorize the State Registrar of Vital Statistics to issue a new birth certificate for the child naming the respondent as the father, and further that he is not authorized to file information relating thereto such as is contained in the copy of the Circuit Court decree. There is no proof establishing conclusively that the child is legitimate, and you cannot act without such proof. If the Circuit Court can make a finding

of fact that the respondent father has recognized the child as his own, and has legitimated the child, an amendatory decree setting out such a finding would afford the State Registrar of Vital Statistics sufficient proof of legitimation to act in compliance with the orders in the decree. Otherwise, it is my opinion that the State Registrar of Vital Statistics does not have authority under law to so act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 4, 1949.

Hon. P. B. Shaw,
Superintendent,
Board of Education,
Shelby County,
Columbiana, Alabama.

Schools—County Boards of Education—Libraries.

County Boards of Education may make appropriations for books for county circulating library which serves school children in part under the provisions of Title 52, Section 376, Code of Alabama 1940.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, dated January 22, 1949, is as follows:

"The Shelby County Board of Education would like to know if it is legal to pay school funds for books for a County Circulating Library.

"This is a county circulating library which sets up sub stations in the different communities (in the schools where possible.) This library serves school children and adults."

It is my opinion that the appropriation by the Shelby County Board of Education for books to be used in the county circulating library under the circumstances set forth in your inquiry is legal.

County Boards of Education may appropriate to any public school under the control of the County Board of Education for the purpose of establishing, maintaining, enlarging or improving public libraries in such school. Title 52, Section 376, Code of Alabama 1940. See also

Quarterly Report of Attorney General, Vol. 14, page 286; *Gray v. State*, 231 Ala. 229, 164 So. 293. In my opinion the appropriation which the Shelby County Board of Education intends to make is tantamount to an appropriation for libraries for the public schools in the light of the facts set forth in your inquiry. According to your request the circulating library in question serves both school children and adults. Some of the library substations are placed in schools wherever possible. Your situation is, therefore, to be contrasted with the situation which was the subject of the opinion in Quarterly Report of Attorney General, Vol. 20, page 371, where the library was not in any way connected with the public school system of the county and was wholly divorced from such system. The instant opinion is, therefore, not in conflict with the opinion in Volume 20, *supra*. Cf. Quarterly Report of Attorney General, Volume 32, page 15.

The connection between the Shelby County circulating library and the public schools is intimate enough to sustain the appropriation which you propose.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 4, 1949.

Honorable J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Jurors and Juries—Compensation.

Per diem compensation of former jury commissioner is not to be considered in paying incumbent commissioner for services under Title 30, Section 12, Code of Alabama 1940.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of February 7, 1949, is as follows:

"I would like to receive an opinion on the following state of facts.

"On February 11, 1947, J. W. Calhoun was appointed a member of the jury commission by the Governor of Alabama; and he was paid the sum of \$200.00 on January 31, 1948, for his services. On

November 13, 1948, J. W. Calhoun resigned; and H. H. Hollis was appointed a member of the jury commission succeeding J. W. Calhoun on the same date.

"Each of said commissioners served and performed their duties while they were a member of said commission. However, it is now time to pay the jury commissioners for their services; and I would like to find out if I should pay H. H. Hollis the sum of \$200.00 or pay J. W. Calhoun for the time he served and H. H. Hollis for the time he served.

"Will you please render your opinion on these facts as early as possible."

In answer to your inquiry, your attention is invited to Title 30, Section 12, Code of Alabama 1940, which provides as follows:

"§ 12. Salaries of members.—Each member of the jury commission shall be paid the sum of five dollars per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the county treasury upon the warrant of the probate judge of the county. Such warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered; but the compensation of each member of the commission shall not exceed for any year of his term the following amounts: In counties of twenty-five thousand population or less one hundred dollars; in counties exceeding twenty-five thousand and not exceeding fifty thousand population two hundred dollars; in counties exceeding fifty thousand and not exceeding seventy-five thousand population three hundred dollars; and in counties exceeding seventy-five thousand population six hundred dollars; the population of said respective counties to be determined by the last preceding federal census."

Reading your inquiry in the light of this section, I am of the opinion that you are authorized to pay Mr. H. H. Hollis the sum of five dollars per day for each day during which he performed any substantial service, not to exceed the statutory limit set out above. It is my further opinion that you are also authorized to pay Mr. J. W. Calhoun the sum of five dollars per day for each day in which he performed any substantial service, not to exceed the statutory limit set out above.

I refer you to Quarterly Report of Attorney General, Volume 46, page 79. This opinion deals with the compensation of jury commissioners who serve during the interim between the time their term expires and the time the Governor appoints their successors. I quote a portion of this opinion:

"The old members of the jury commission, holding over after the expiration of their term, would be entitled to five dollars per

day for the time actually engaged in the discharge of their duties as such members, subject to the maximum limitations as to the total amount receivable in 'any term' year based on a population classification. The 'term year' runs from the first Monday after the second Tuesday in January until the same time in the following year. Their successors, although not appointed and qualified until a date subsequent to the beginning of the new term, would be entitled to the same compensation. The maximum 'year term' limitations are applicable to the individual incumbents and not to the 'term year' itself, though the positions be filled by different parties. The compensation paid to the members of the old jury commission should not be considered in determining the maximum amount allowable to their successors in any 'term year.'" (Emphasis supplied.)

Your attention is also invited to Quarterly Report of Attorney General, Volume 10, page 5. This opinion, dealing with compensation of members of the Alabama Alcoholic Beverage Control Board, held that a new member succeeding a member who had used up the maximum per diem for his official year was entitled to per diem for his services, not to exceed the statutory limit.

In my opinion, the statute provides for per diem payment to each member of the commission, not to exceed a certain sum as provided for in the statute; and the amount paid a former commissioner should not be considered in paying a new appointee.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 4, 1949.

Hon. W. R. Stuart,
Judge of Probate,
Baldwin County,
Bay Minette, Alabama.

Taxation—Licenses.

Under Title 51, Section 613, Code of Alabama 1940, as amended by Act No. 688, General Acts 1947, page 522, approved October 7, 1947, hotels, motels and tourist camps having less than four coin-operated radios should pay \$8.00 for a State license. If said hotels, motels and tourist camps have more than four coin-operated radios, they should pay \$2.00 for each coin-operated radio. The county license is in addition to the State license and is fifty percent of the amount of the State license.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1949, is as follows:

"Please give me your opinion as to how much we should charge Hotels, Motels and Tourist Camps having less than 4 coin operated radios, and how much if in excess of 4.

"Title 51, Sec. 613, Code of Alabama 1940, amended June 22, 1943, page 185. This Schedule gives less than five coin operated radios \$8.00 each, and for each radio in excess of 4, \$2.00 each. \$8.00 for each location.

"Does the above schedule include State and County License? My charges have been questioned by the Auditors of my books."

In answering your request, in my opinion, you should charge hotels, motels and tourist camps having less than four coin-operated radios \$8.00 for a State license under Title 51, Section 613, Code of Alabama 1940, as amended by Act No. 688, General Acts 1947, page 522, approved October 7, 1947. If they have in excess of four coin-operated radios, you should charge \$2.00 for each radio; five would be \$10.00, six would be \$12.00 and sixteen \$32.00.

Title 51, Section 613, as amended by Act No. 688, supra, provides, in part, as follows:

"For each machine for vending gum, candy, soft drinks, ice cream, coffee, pop corn, food of any kind, drink of any kind, pencils, handkerchiefs, combs, drinking cups, cigarettes or other tobacco products, or other articles or merchandise, and for each machine for use in testing strength or grip, shining shoes, making or developing photographs, recording the voice or other sound, and each coin-operated radio, * * * except that hotels, motels, tourist camps, or other places of business having less than five (5) coin-operated radios, \$8.00; and for each such radio in excess of four (4) \$2.00 each; * * *"

The county license is in addition to the State license and if fifty per cent of the amount of the State license. If the State license is \$8.00, the county license would be \$4.00. Title 51, Section 831, as amended by Act No. 546, General Acts 1943, page 535, approved July 10, 1943, provides, in part, as follows:

"Before any person, firm, or corporation shall engage in or carry on any business or do any act for which a license by law is

required, he, they, or it, except as otherwise provided, shall pay to the judge of probate of the county in which it is proposed to engage in or carry on such business or do such act, or to the commissioner of licenses or the State Department of Revenue, as specifically the amount required for such license, * * *. (B) There is hereby levied for the use and benefit of and to be paid to the county in which the license is issued, in addition to all license taxes levied under the provisions of Article 1 of Chapter 20, for state purposes and which are payable to the Judge of Probate or Commissioner of Licenses, a sum equal to fifty per cent of the amount levied for state purposes, except as otherwise specifically provided."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 8, 1949.

Hon. W. H. Drinkard,
Director of Finance,
Department of Finance,
CAPITOL.

Building Commission—Powers.

The Building Commission created by Title 55, Section 365, Code of Alabama 1940, may pay out of the appropriation made to it the State's proportionate part for paving streets around the capitol building.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of January 7, 1949, is as follows:

"This office has just been confronted with the problem of a paving assessment in the sum of \$2,403.66 for paving along side the state property on Ripley Street. Sometime in the past when this development for the city improvement was in the making, this office was contacted with regard to this paving and the records show that it has been customary up to this time for the State to assist the City in the improvement program by paying for its share of paving adjacent to the Capitol grounds in the city of Montgomery. This payment formerly came from the Governor's Contingent or Emergency Funds. Since there is no provision for this type of expenditure from these funds and since this expenditure is for an improvement to the Capitol property and grounds, it would appear

that the Capitol Building Commission should make the expenditure from the fund so provided as set out in Title 55, Article 4, Code of Alabama 1940.

"I trust you will give this your usual prompt attention."

In answer to your request, you are advised that the State's part of the expense of paving that part of Ripley Street, which runs along and adjoins the block upon which the State Capitol is located, should be properly paid from the funds appropriated to the Capitol Building Commission under Title 55, Section 367, Code of Alabama 1940.

Title 55, Section 366, Code of Alabama 1940, sets out the powers and authority of this Commission. Among the powers and authority granted to the Commission is the power to improve the present capitol building and grounds. If in the judgment of the members of the Commission it would improve the capitol grounds to have the street around said block of property paved then, in my opinion, the Commission could itself be independent of the City of Montgomery to pave this entire street. The powers given this Commission for improvement of the grounds surrounding the present capitol building are very broad. The fact that these streets are city streets would not, in my judgment, mitigate against the broad powers given to this Commission for the improvement of the capitol grounds and likewise would not prohibit this Commission from expending this fund for the paving and improving of these streets.

You are, therefore, advised that in my opinion the State's proportionate part for paving this particular street should properly be paid from the funds of the Capitol Building Commission and not from the Governor's Contingent or Emergency Fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 8, 1949.

Mrs. A. L. Harmon,
Register,
Circuit and Inferior Courts, in Equity,
Houston County,
Dothan, Alabama.

Costs and Fees—Actions—Clerks of Circuit Court—Registers
—Trial Tax.

1. When a suit originating on the law side is transferred to the equity side upon order of the court or upon motion of the suitors at law, only one trial tax on the law side is chargeable. This cost and other costs on the law side, before transfer,

are items incurred at the instance of the original complainant or plaintiff although a cross-bill in equity is filed by the respondent or defendant.

2. A respondent or defendant filing a cross-bill in equity assumes the status of a complainant or plaintiff insofar as any action on the cross-bill is concerned. When judgment is rendered against the original complainant or plaintiff for costs and is returned "no property found," execution may issue against the original respondent or defendant for the costs incurred by him in obtaining judgment on his cross-bill, but not for any costs in defending the original action.

Opinion by Assistant Attorney General Screws.

Dear Madam:

Your request for an official opinion, bearing date of February 23, 1949, is as follows:

"A man by the name of Adus Fulford brought suit on the law side of the docket in the Circuit Court of Houston County against a man by the name of Robert Taylor. After this suit was filed, the plaintiff made motion to transfer the case to the Equity Court and this motion was granted by the Judge of the Circuit Court. After the case was transferred to the Equity side, Adus Fulford, the plaintiff, filed his bill of complaint and in due time Robert Taylor filed an answer and cross bill.

"Testimony was taken in the case and it was submitted to the Judge of the Circuit Court for final decree. In the final decree relief was denied to plaintiff and his bill was dismissed. Relief was granted to defendant on his cross bill and judgment was rendered in favor of defendant and against plaintiff for a certain sum of money and all cost of court in the entire case.

"After this judgment was rendered, plaintiff went into bankruptcy. Execution was issued against plaintiff and returned by the sheriff of this county 'no property found.'

"I would like your opinion as to (1) whether an execution should be issued against defendant for the cost incurred at his instance in defending the original suit or (2) whether execution should issue against the defendant for cost incurred at his instance in prosecuting the cross bill. In either event, should defendant be required to pay any cost of the case in the Circuit Court at Law or should he be required to pay trial tax on the Equity side of the Court? Also, whether or not defendant should be required to pay trial tax in the Circuit Court, at Law."

Before specifically answering your inquiries, I desire to make certain observations in regard to the situation set forth in your letter of inquiry.

When a suit originating on the law side is transferred to the equity side upon order of the court or upon motion of the suitors at law, only one trial tax in the original case on the law side is chargeable.—Quarterly Report of Attorney General, Volume 14, page 181.

The filing of a cross-bill in equity cases is governed by the provisions of Equity Rule No. 26, which provides as follows:

“Cross-bills. A defendant may obtain relief against a party plaintiff or defendant for any cause connected with or growing out of the bill, by alleging in his answer, and as a part thereof, the facts upon which such relief is prayed. The matters or facts thus alleged must be considered in the nature of a cross bill and be heard at the same time as the original bill. When the presence of parties other than those to the original bill is required for the granting of complete relief, such outside persons may be made defendants to a cross-bill incorporated in the answer or otherwise. It shall not be necessary to issue a summons or a copy of the cross-bill to any defendant to a cross-bill who is a plaintiff in the original bill. The party complainant or defendant, as to whom such new matter is alleged, must make answer thereto under the rules and regulations provided for the answers of defendant to original bills.”

While a cross-bill has characteristics of, and is subject to, rules of law and procedure applicable to a separate suit, it is not a distinct action.—*Bell v. McLaughlin*, 183 Ala. 548, 62 So. 798. Nevertheless, in my opinion, the respondent or defendant filing a cross-bill in equity assumes the status of a complainant or plaintiff insofar as any action on the cross-bill is concerned. Consequently, when a judgment is rendered against the original complainant or plaintiff for costs and is returned “no property found,” execution may issue against the original respondent or defendant for the costs incurred by him in obtaining the judgment on his cross-bill.—Title 7, Section 518, Code of Alabama 1940 and Title 11, Section 7, Code of Alabama 1940. However, execution may not issue against the original respondent or defendant for any costs incurred by him in defending the original action, as he is still the respondent or defendant insofar as said original action is concerned.—Quarterly Report of Attorney General, Volume 19, page 60.

In view of the foregoing, it is my opinion that your first main inquiry should be answered in the negative, and your second main inquiry answered in the affirmative.

In answer to your unnumbered supplemental inquiries, it follows that there is only one trial tax chargeable, which is on the law side and is part of the original action. This item of cost is incurred at the instance of the original complainant or plaintiff, for which the origi-

nal respondent or defendant would not be liable. Likewise, it follows that the original respondent or defendant would not be liable for any costs on the law side (before transferred to the equity side) as such costs were incurred at the instance of the original complainant or plaintiff.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 10, 1949.

Hon. Clyde D. Watson,
Mayor of Clayton,
Barbour County,
Clayton, Alabama.

Licenses—Veterans.

1. Under Title 51, Section 864, Code of Alabama 1940, as amended by Act No. 366, General Acts 1945, page 589, a disabled veteran is not entitled to the \$25.00 state, county and municipal license tax exemption when he owns property valued at \$5,000.00 or more.

2. Under Act No. 353, General Acts 1945, as amended by Act No. 698, General Acts 1947, page 535, a veteran (disabled or not) is entitled to a state, county and municipal license tax exemption of \$15.00 when he owns property valued at \$7,000.00 or more.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of February 10, 1949, is as follows:

"Under Title 51, Section 864, Code of Alabama 1940 what is the amount of license exemption due a veteran who is not a member or a corporation, association or partnership, and who owns property over and above the amount of \$7,000.00. Said veteran operating his business as an individual."

Title 51, Section 864, Code of Alabama 1940, to which you refer, has been amended by Act No. 366, General Acts 1945, page 589. Section 4 of the amendatory act reads in pertinent part as follows:

"Section 4. Section 864 of Title 51 of the 1940 Code of Alabama is hereby amended to read as follows: 'Section 864. Any vet-

eran whose property both real and personal is valued at five thousand dollars or more shall be precluded from the exemptions granted herein; nor shall a veteran whose net annual income is two thousand and five hundred dollars or more be entitled to the exemptions herein granted.' " (Emphasis supplied.)

You state that the veteran referred to "owns property over and above the amount of \$7,000.00." The statute noted relates to disabled veterans, and since it precludes exemption from license payment for any such veteran who owns property valued at \$5,000.00 or more, it is obvious that said veteran has no license exemption under Title 51, Section 864, Code of Alabama 1940, as amended.

Your attention is specifically called to the fact that Title 51, Section 864, Code of Alabama 1940, as amended, relates solely to a \$25.00 exemption from state, county and municipal license tax of a disabled veteran.

Act No. 698, General Acts 1947, page 535, amending Act No. 353, General Acts 1945, page 570, provides for a state, county and municipal license exemption of all qualified veterans (disabled or not), in an amount of \$35.00. To qualify, a veteran must be a bona fide resident of Alabama and shall have been honorably discharged after ninety days or more of military service. The exemption covers a period of time of six years from July 6, 1945 or six years after the veteran's termination of service. The exemption does not include a license tax against rolling stores or license tax for the registration or operation of any motor vehicle.

Section 2 of said Act reads in pertinent part as follows:

"* * Provided, however, that any veteran whose property, both real and personal, is valued at \$7,000.00 or more or whose net annual income is \$3,000.00 or more shall not be granted the exemption provided herein but shall be granted an exemption of \$15.00 on his licenses from each the City, County and State." (Emphasis supplied.)

From the above it is seen that a qualifying veteran under this latter noted statutory provision (whether he is disabled or not) is entitled to a \$15.00 state license exemption, a \$15.00 county license exemption and a \$15.00 municipal license exemption, even though he owns property valued at \$7,000.00 or more.

The two legislative enactments are to be construed separately, the first being directed to disabled veterans and the second to all veterans. Thus, a disabled veteran in many instances is entitled to separate benefits arising under each individual enactment.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 10, 1949.

Hon. G. H. Stacy,
Judge of Probate,
Bibb County,
Centreville, Alabama.

Courts of County Commissioners—Convicts—Counties—Title
45, Sections 95, 96 and 97, Code of Alabama 1940.

County convicts sentenced to "hard labor for the county" may be worked in and about the county courthouse and grounds under the authority contained in Title 45, Section 95, Code of Alabama 1940; however, under Title 45, Sections 96 and 97, Code of Alabama 1940, a county electing to turn its county convicts over to the state must turn all of said convicts over to the state and can neither retain a proportionate number for purposes of county work nor repossess a proportionate number for purposes of county work.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of December 11, 1948, is as follows:

"We are in need of labor for janitor service and labor to care for the grounds of the Courthouse in and about the County Courthouse in this County. We have at present a large number of men who are sentenced by the County Court and Circuit Court of this County to 'hard labor for Bibb County, Alabama.' All of such men and convicts have been heretofore turned over to the State to serve their 'hard labor.' We are in need and could use two or three of such convicts in the performance of the above mentioned services for the County, at all times. All other such convicts we would still turn over to the State.

"In view of the above, I, as Judge of Probate, of Bibb County, Alabama, request that you give me your official opinion in answer to the following questions:

"1. Under the Law of Alabama could the Probate Judge or the County Commissioner's Court retain in the County and work about the Court House of the County and its grounds part of the convicts sentenced to hard labor for the said County and send the others so sentenced on to the State?

"2. If you say that we could do so, then outline the necessary steps for us to take to do so.

"3. If a person is sentenced by either the County Court or the Circuit Court to imprisonment in the County jail of Bibb County, Alabama, may such person be worked, during the period of such sentence as a janitor for the Court House or grounds? If so, under whose supervision may he be worked? If he cannot be required to so work may he do so voluntarily?

"For your information I will say that we have no controversy about any of these questions. We are asking for the opinion as a guide for our future actions in the matter."

Title 45, Section 95, Code of Alabama 1940, reads as follows:

"§ 95. Hard labor for county includes labor for state.—'Hard labor for the county,' as used in the law of the state, shall include labor on the public roads, public bridges and other public works in the county and state, and authorizes the use of the county convicts by the department in like manner as state convicts are now used, or hereafter used."

It can be seen from this section of the Code that "hard labor for the county" would include work in and about the county courthouse and grounds inasmuch as such work would fall clearly within labor on the "public works" of the county.

Thus, it is clear that county convicts sentenced to "hard labor for Bibb County, Alabama," and retained by Bibb County, could be used by the county for work around the courthouse. However, you state in your request for an official opinion that all such convicts have been heretofore turned over to the state to serve their "hard labor." This has unquestionably been done under the authority of Title 45, Sections 96 and 97, Code of Alabama 1940.

Section 96 reads as follows:

"§ 96. Delivery of county convicts to department.—The courts of county commissioners, boards of revenue, or other like bodies of the several counties of the state, may deliver to the department all county convicts sentenced to hard labor for the county, in like manner as now provided by law for the delivery of state convicts to the department. The department shall receive said county convicts in the same manner as they now receive state convicts, and shall pay to the proper county authorities the items of cost provided in section 69 of this title." (Emphasis supplied.)

It is noted that the wording of Section 96 is to the effect that all county convicts may be turned over to the state.

Section 97, in turn, reads as follows:

"§ 97. Resolution of county authorities.—Any county of the state desiring to dispose of its county convicts, under and in accordance with this article, shall make and enter a resolution and order through its court of county commissioners, board of revenue, or other like body, so declaring, which said resolution and order shall be placed upon the minutes of said court or board, and a copy thereof forwarded to the department. Beginning ninety days after the date of said order, said county shall deliver all of its county convicts to the department, at the county seat of the county, or at the place where said convict or convicts are then being confined, and the department shall receive said convicts, as provided herein. Said order and resolution of such county shall be and remain in effect for a period of not less than three years after making the same, and all convicts sentenced to hard labor for the county shall thereafter, during the term mentioned, be delivered to the department, as provided for herein. Provided, however, that by and with the consent of the department, and with the approval of the governor, the county may, by order and resolution of the court of county commissioners, board of revenue, or other like body, repossess its convicts; but in that event, the county shall pay for the transportation and guarding of its convicts from the place where the state is confining the same to the place of confinement within the county." (Emphasis supplied.)

Construing the operative scope of Section 97, it is here again noted that the wording thereof indicates a contemplation that all county convicts shall be turned over to the state when the county elects to act thereunder. With specific reference to the proviso of Section 97, which is the last sentence of said section, the provision is made that the county may "repossess its convicts" with the consent of the department, the approval of the Governor and upon proper resolution of the county governing body. It is clear that the use of the word "convicts" as used in this proviso relates to those convicts previously referred to in the immediately preceding portions of the Code. As previously noted and commented upon, this would mean all convicts.

It is well settled in interpretations of statutory law that all statutes relating to the same subject matter must be considered in *pari materia* in arriving at the true determination of legislative intent. *Union Central Life Insurance Co. v. State*, 226 Ala. 420, 147 So. 187; *Donoghue v. Bunkley*, 247 Ala. 423, 25 So. 2d 61.

It is equally well settled that in the interpretation of a statute the whole must be considered to ascertain the sense and significance in which words or phrases are used in particular parts or clauses. *State Ex Rel. Winter v. Sayre*, 118 Ala. 1, 28, 24 So. 89.

The language employed by our Alabama Supreme Court in the case of *State Ex Rel. Meyer v. Greene, Judge of Probate*, and *State Ex Rel. Woodward v. Skeggs, Judge of Probate*, 154 Ala. 249, 46 So. 268, is con-

sidered particularly apropos to the instant case and I quote therefrom as follows:

"* * * It is a familiar rule of construction that where, in a constitution or statute, a word or phrase is repeated, and in one instance its meaning is definite and clear, and in the other it is susceptible of two meanings, it will be presumed to have been employed in the former sense, unless a contrary intent appears.

* * * * *

Applying the foregoing principles of law to the question here before us, I am of the opinion that the Legislature intended that counties must turn either all or none of their convicts over to the state without the right of turning over a proportionate number of said convicts to the state and withholding a proportionate number of said convicts for strictly county work purposes. Further, I am of the opinion that the proviso contained in Section 97, supra, to the effect that the county, under the outlined procedure, may "repossess its convicts" means that it must repossess all of its convicts and a repossession in part cannot be effected.

On this basis of statutory construction you are herewith advised that it is my opinion that the answer to your first question is in the negative.

Accordingly, it is not necessary to answer question number two posed by your inquiry.

Your third question is obviously directed toward a situation where only a portion of the county convicts are turned over to the state or where only a portion of the county convicts are sought to be repossessed. Therefore, it is here again considered unnecessary to answer this question in view of my answer to your first question stating that this cannot be done.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 14, 1949.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Counties—Jails—Courts of County Commissioners.

County may buy deep freeze unit for the county jail.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of January 10, 1949, is as follows:

"We have a requisition from the Sheriff of our County for a deep freeze unit for the Elmore County Jail. Please advise this office whether or not the county can legally purchase this unit for use at the Jail. The cost will be approximately \$500."

I am of the opinion that your question should be answered in the affirmative. Title 45, Section 184, Code of Alabama 1940, provides as follows:

"The expense incident to the construction, maintenance, sanitation, healthfulness and hygiene of each county jail, prison, and almshouse in this state shall be paid out of the funds of the county in which such institution is located and of the town or city, if the institution be a town or city institution."

In construing this section, this office has held that the county could purchase an electric refrigerator to be used in connection with the feeding of prisoners at the jail. Biennial Report of Attorney General, 1934-36, page 163.

Your attention is called to the following opinions of this office, which deal with analogous situations and support the position taken here: Biennial Report of Attorney General, 1926-28, pages 171 and 201; Biennial Report of Attorney General, 1934-36, pages 143 and 268; and Quarterly Report of Attorney General, Vol. 15, page 151.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 14, 1949.

Hon. F. R. Mathews, Judge,
Municipal Court of Bessemer,
Jefferson County,
Bessemer, Alabama.

Statutes.

Act No. 239, General Acts 1947, page 104, which provides that county officers on a salary basis in counties of over four hundred thousand population shall pay into the county all fees, costs, commission, and perquisites derived from said offices, does not repeal Act No. 226, Local Acts 1947, page 126, which authorizes the Judge of the newly created Bessemer Civil and Misdemeanor Court to collect and retain as a part of the perquisites of his office the fees collected in the performance of marriage ceremonies.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of March 29, 1948, is as follows:

"At the Session of the Legislature held last year my Court bill was reconstructed under the title of Bessemer Civil and Misdemeanor Court. Section 30 of this act reads as follows:

"Section 30. That the Judge of said Court shall be authorized and empowered to perform marriage ceremonies and collect and retain as a part of the perquisites of his office the fees which are now or may hereafter be allowed by law."

"At the same session of the Legislature they enacted a general bill with local application purporting to limit elective officers to the salary fixed by law.

"Question: Does the general bill enclosed herewith, approved August 1, 1947 repeal Section 30 of local act creating Bessemer Civil and Misdemeanor Court approved July 29, 1947?

"I am enclosing copies of both measures for your convenience, together with a brief memorandum of the authorities, and shall be glad to have your opinion at your earliest convenience."

I am of the opinion that Act No. 239, General Acts 1947, page 104, does not repeal Act No. 226, Local Acts 1947, page 126.

Act No. 239, *supra*, reads as follows:

"To require all county officers on a salary basis in counties having a population of four hundred thousand (400,000), or more, according to the last or any subsequent Federal census to pay into the county treasury all fees, cost, commissions, and perquisite derived from said offices or monies charged, or collected by them by reason of any official act or for the performance of any service connected directly or indirectly with said offices and to prescribe that the salary fixed by law shall be the sole and only compensation received by such officers for the performance of the duties of their office or any act or service charged for by them growing out of the performance of their official duties.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That all county officers on a salary basis in counties of this State having a population of four hundred thousand (400,000) or more according to the last or any subsequent Federal census, shall pay into the county treasury all fees, costs, commissions, and perquisites derived from said office or monies, charged or collected by them by reason of any official act or for the performance of any service connected directly or indirectly with said offices or for the sale of any information or the copies of any documents, papers, maps or records relating directly or indirectly to said offices.

"Section 2. Be it further enacted that the salary fixed by law shall be the sole and only compensation received by such officers for the performance of the duties of their office or for any act or service charged for by them growing out of the performance of their official duties or connected with the operation or conduct of their respective offices, except fees allowed officers in Title 29, Sec. 129, Code of Alabama 1940, and amendments thereto.

"Section 3. That this act shall become effective upon its approval by the governor.

"Approved August 1, 1947."

Local Act No. 226 establishes an inferior court in Precincts 2 and 33 of Jefferson County, Alabama, and the pertinent provisions of that Act, which we are here concerned with, read as follows:

"Section 1. That there is hereby established an inferior court in Precincts 2 and 33 in Jefferson County, Alabama; said Precincts lying within or partly within the City of Bessemer, Alabama, which shall be known and designated as the Bessemer Civil and Misdemeanor Court, which shall be in lieu of all Justices of the Peace within said Precincts and in lieu of all inferior courts heretofore created in lieu of the Justices of the Peace in said Precincts. Said Court

shall be held in a place furnished and designated by the County Commission of Jefferson County as the place for holding the same. That said Court shall have all the powers and jurisdiction now conferred or that may hereafter be conferred by law on Justices of the Peace, and the Judge of said Court shall have and exercise all the power and authority, perform all the duties now prescribed, or that may hereafter be prescribed by law for Justices of the Peace, and shall have all the power and authority over the matters transacted in said Court.

* * * * *

"Section 6. That the judge of said Court shall receive an annual salary of Five Thousand Four Hundred (\$5400.00) Dollars payable in equal monthly installments out of the county treasury of Jefferson County. The Judge of said Court shall not during his tenure of office practice law in any of the courts of this state or of the United States."

* * * * *

"Section 30. That the Judge of said Court shall be authorized and empowered to perform marriage ceremonies and collect and retain as a part of the perquisites of his office the fees which are now or may hereafter be allowed by law.

"Approved July 29, 1947."

The above-quoted acts were enacted at the same session of the Legislature, and General Act No. 239, supra, was approved two days subsequent to the approval of Local Act No. 226, supra. It has long been an established rule of law that the enactment by a legislative assembly of two or more acts upon the same subject matter creates a presumption that the acts passed by the same Legislature were intended to co-exist to attain by mutual operation the object of the legislation.

The Supreme Court of Alabama, in the case of **City Council of Montgomery v. National Building Assn.**, 108 Ala. 336, 18 So. 816, expressly follows this accepted principle of law by holding as follows:

"The question of implied repeal is one of intention, and where two acts are passed at the same session of the legislature on the same subject it shows an intent that one is not repealed by the other, but that they are to be construed together * * * * *. The general principle is based * * * * upon the theory that the intention of the law makers must be effectuated and the courts, to that end, must, if possible, find a field for the operation of both statutes so that both can stand, and, to this end also, when two statutes are passed at the same session of the Legislature they must be construed together, the presumption being in such case that the Legislature intended that both should stand, and that the earlier should not be repealed by the later."

The Supreme Court of Alabama has consistently followed the holding in the above-cited case, and in the case of *Ex Parte Jones*, 212 Ala. 259, 102 So. 234, the Court quoted in its opinion the above excerpts from the case of *City Council of Montgomery v. National Building Assn.*, supra.

Your attention is further invited to the absence of a repealer clause in General Act No. 239, supra. It is an established rule of statutory construction that repeal by implication is not favored, but is looked upon with great disfavor.

State v. Smiley,
219 Ala. 119, 121 So. 398;
W. S. Brown Mercantile Co. v. Yeilding Bros. Department Store,
200 Ala. 412, 76 So. 4;
Tucker v. McLendon,
210 Ala. 561, 98 So. 797;
Davis v. Browder,
231 Ala. 332, 165 So. 89.

This rule is well stated in *Southerlands' Text on Statutory Construction*, as follows:

"Section 574, page 528, *Lewis Southerland Statutory Construction*, (Second Edition.)

"It is the established rule of construction that the law does not favor a repeal by implication, but that where there are two or more provisions relating to the same subject matter they must, if possible, be construed so as to maintain the integrity of both. It is also a rule that where two statutes treat of the same subject, one being Special and the other General, unless they are irreconcilably inconsistent, the later, although latest in date, will not be held to have repealed the former, but the Special Act will prevail in its application to the subject matter as far as coming within its particular provision.

"Section 575, *Lewis Southerland Statutory Construction*, (Second Edition.)

"It is a maxim in the construction of statutes that the law does not favor a repeal by implication. The earlier statutes continue in force unless the two are clearly inconsistent with and repugnant to each other, or unless in the later statute some express notice is given of the former plainly indicating an intention to repeal it; and where two acts are seemingly repugnant they should, if possible, be so construed that the later may not operate as a repeal of the former by implication."

Thus, the invariable rule of construction in respect to the repeal of statutes by implication is that the earliest act remains in force, unless

the two are manifestly inconsistent with and repugnant to each other. However, this inconsistency or repugnancy must be absolute, invincible and material, so that the two acts cannot be harmonized or given effect at the same time. Conversely, it is a general rule that an act is not impliedly repealed because of conflict, inconsistency or repugnancy between it and a later act unless the conflict is plain unavoidable, and irreconcilable. See *Cook v. Myer*, 73 Ala. 580; *Riggs v. Brewer*, 64 Ala. 282; *Parker v. Hubbard*, 64 Ala. 203.

In view of these long established rules of statutory construction, I am of the opinion that General Act No. 239, supra, did not repeal Section 30 of Local Act No. 226, supra. These two acts can each be given a field of operation. Although there is an inconsistency in the two acts, this inconsistency is not so absolute and material that the two acts cannot be harmonized or given effect at the same time. The Supreme Court of Alabama, in the case of *State, Ex Rel. Tubbs, et al v. White, et al*, 160 Ala. 168, 49 So. 78, held that a mere inconsistency in the provisions of a special former statute and a later general one is not enough to authorize an implication that the older special statute was repealed by the subsequent general statute.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 15, 1949.

Hon. William W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Licenses—Chain Stores.

Three stores or mercantile establishments under a common ownership, supervision, or management, of a single person or any group of persons as defined in Title 51, Section 627, Code of Alabama 1940, is a chain of stores and are liable for the annual license fee as specified in Title 51, Section 624, Code of Alabama 1940.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of February 16, 1949, is as follows:

"The Attorney, Mr. Henry C. Meader, representing the Hodo Motor Car Company who has received a citation for a chain-store license, has submitted the matter to us and has requested that we obtain a ruling from your department.

"I am enclosing a letter addressed to Judge Hill from Mr. Meader which sets out the case in detail.

"We will appreciate it if you will submit us a ruling in the matter so that we can receive same within ten days as the Revenue Department has given Hodo Motor Car Company ten days in which to obtain this license."

The letter from Mr. Meader to Judge Hill referred to in your inquiry is set out below:

"Dear Sir:

"Re: Hodo Motor Company, Inc.

Citation for chain store license

"Hodo Motor Company, Inc., an Alabama corporation, has been cited to pay an increased store license on the theory that it is the third store in a chain, the other two stores being stores owned and operated by Hodo and Vandigriff, Inc., an Alabama corporation, one in Birmingham and one in Montgomery.

"The merchandise sold by these two corporations is totally different. Hodo Motor Company, Inc. is the Dodge dealer in this territory and sells only Dodge cars and trucks, parts and accessories, and service for same; while Hodo and Vandigriff, Inc. sells only trailer bodies and equipment for trailers. Both stores of Hodo and Vandigriff, Inc. are managed by W. D. Bach; and Hodo Motor Company, Inc. is managed by Dr. D. W. Hodo. Hodo and Vandigriff, Inc. operates two stores, and pays the chain store license on the second store.

"There is no common management of the two companies, no common or central buying or selling or financing arrangements, each of said corporations being entirely independent of the other. They do not use any facilities in common. The buying for said businesses is not centralized or done by one person or management.

"H. L. Vandigriff as an individual and D. W. Hodo as an individual each owns more than 25% of the stock of Hodo Motor Company, Inc. and each also owns more than 25% of the stock of Hodo and Vandigriff, Inc. The few remaining shares in each corporation are owned by William Hodo, individually. D. W. Hodo is President,

H. L. Vandigriff is Vice-President and William Hodo is secretary of both corporations.

"It does not seem to us that the provisions of Section 626 and 627 of Title 51 of the Alabama Code of 1940 apply to this case. While those provisions are not as definite as they might be, it seems to us that to constitute a chain under those Sections, there must be something other than simple investments by individuals in the same enterprises; that there must be some of the elements of the chain store in the operation and there must be some unity in the group which controls, such as a partnership or another corporation.

"Also, in our opinion the situation in question would come under the exception provided in the latter part of Section 627 of Title 51 which reads 'Provided, a person owning or operating a store and owning an interest in not more than one other store which handles merchandise of an entirely different character * * * * shall not be termed a chain of stores, but shall be required to pay only the annual license on each store; each store being considered as separate units.'

"While the amount involved is small, we think the principle is important, and the expense when once established would be continuing. We would, therefore, be glad to have a ruling as to whether the chain store license applies under the facts as stated."

It is my considered opinion that the Hodo Motor Company, Inc. is a third store in a chain of stores and is, therefore, subject to the license fee of Fifteen Dollars (\$15.00) as required by Title 51, Section 624, Code of Alabama 1940.

The facts as set forth in the above letter to Judge Hill clearly, in my judgment, establish the fact that the Hodo Motor Company, Inc. is "such additional store" as specified in Title 51, Section 624, Code of Alabama 1940, which provides as follows:

"§ 624. License fees per annum. (a) upon one store, the annual license fee shall be one dollar for each store. (b) Upon two stores or more but not to exceed five stores, the annual license fee shall be fifteen dollars for such additional store. (c) Upon each store in excess of five but not to exceed ten, the annual license fee shall be twenty-two dollars and fifty cents for each additional store. (d) Upon each store in excess of ten but not to exceed twenty the annual license fee shall be thirty-seven dollars and fifty cents for each such additional store. (e) Upon each store in excess of twenty the annual license fee shall be one hundred twelve dollars and fifty cents for each such additional store."

The above conclusion is based on the following pertinent provisions of Section 626 and Section 627, Title 51, Code of Alabama 1940:

"§ 626. Scope of provisions.—The provisions of this article shall be construed to apply to every person, firm, corporation, co-partnership, or association, either domestic or foreign, which is controlled or held with others by stock ownership of twenty-five percent or ultimately controlled or directed by one management or association of ultimate management, or the buying for said store or stores is centralized or done by one person or management.

"§ 627. Definitions and constructions.— * * * Two or more stores or mercantile establishments shall, for the purpose of this article, be treated as being under a single or common ownership, supervision or management if directly or indirectly owned or controlled by a single person or any group of persons having a common interest in such stores or mercantile establishment. * * * *"

From the above letter, it appears that Mr. H. L. Vandigriff and Mr. G. W. Hodo each own more than twenty-five per cent (25%) of the stock of all three (3) of the stores or mercantile establishments involved in this inquiry and consequently they together own the controlling interest thereof. Therefore, according to the above-quoted provisions of Section 627, these three (3) stores or mercantile establishments are to be treated as being under a common ownership, supervision, or management since they are all three (3) directly controlled by two (2) people having a common interest in such stores or mercantile establishments.

The scope of the provisions of Article 3, Title 51, Code of Alabama 1940, which is the Article dealing with "Stores," are applicable, according to Section 626, supra, to every person, firm, corporation, co-partnership, or association, which is controlled or held with others by stock ownership of 25% of ultimately controlled or directed by one management or association of ultimate management. Since, as illustrated above, according to the provisions of Section 627, supra, these three stores or mercantile establishments are under a common ownership, supervision or management, and in view of the fact that Mr. Vandigriff and Mr. Hodo each own more than 25% of the stock of each of the three establishments, I conclude that the provisions of Section 624(b), supra, are applicable to these three mercantile establishments.

The Hodo Motor Company, Inc., in my opinion, does not come within the proviso of Section 627, supra, which states as follows:

"§ 627. Definitions and constructions.— * * * Provided, a person owning or operating a store and owning an interest in not more than one other store which handles merchandise of an entirely different character, * * * shall not be termed a chain of stores but shall be required to pay only the annual license on each store; each store being considered a separate unit." (Emphasis supplied.)

The proviso is applicable only where a person owns and operates a store and owns an interest in **not more than one** other store which handles merchandise of an entirely different character. In such a situation the annual license is due only on each store. Surely, it cannot be said that it was the legislative intent to require a single store license on each of **three** stores where all three are controlled by a group of persons simply because one of these three stores handles merchandise of an entirely different character from that handled by the other two stores. If that were so, an admitted chain of twenty grocery stores could abolish their chain store character and reduce their license fee requirements, as set forth in Section 624(b), (c), (d), and (e), *supra*, to a single store license for each store simply by purchasing an interest in a small safety pin store in a back alley. This would be "owning an interest in not more than one other store which handles merchandise of an entirely different character" and would, if this contention be correct, make the twenty grocery stores and the safety pin store "not be termed a chain of stores, but shall be required to pay only the annual license on each store; each store being considered a separate unit. Such an interpretation would not, in my judgment, declare the intent of the legislature in this proviso.

It is, therefore, my opinion that the Hodo Motor Company, Inc. is the third store or mercantile establishment in a chain of stores and is liable for the license according to Section 624, *supra*.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

March 18, 1949.

Hon. Bovell Summers,
Tax Assessor,
Etowah County,
Gadsden, Alabama.

Taxation—Ad Valorem Taxes—Automobiles—Exemptions.

The tax exemption afforded blind persons by Title 51, Section 2, Code of Alabama 1940, as amended, extends to ad valorem taxes on automobiles.

• Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of November 1, 1948, is as follows:

"I am the Tax Assessor of Etowah County, and, as you know, assess automobiles for the purpose of certifying to the Tax Collector the amount due thereon.

"There are a few blind persons in Etowah County who own automobiles. When applying to my office for the assessment of the automobile such a person requests the allowance of the exemption from ad valorem taxes found in 1940 Code Title 51 Sec. 2(f) as last amended. It is my view that the exemption allowed in this section does apply to any property, real or personal, up to the extent of \$3000.00 as selected by the person making the assessment. No blind person has been permitted to take advantage of an exemption on all assessments in excess of the statute.

"An examiner of public accounts has suggested to me that this exemption did not apply to automobiles, nor could the blind person select the automobile as a part of the exemption. He seems to take the position that automobiles not being specifically named in Title 51 Sec. 1(c) defining personal property, that therefore automobiles are excluded from the exemption given in Section 2(f).

"My view of Section 1(c) is that the personal property definition there used is all inclusive. It is my view that it would be mandatory upon me to recognize the exemption, if the blind person requests that such exemption be applied on the assessment of an automobile.

"I observe Title 51 Sec. 704 which was amended by the addition of Sub-section (d) in 1945. This section, in my judgment, does not make it mandatory to deny the claimed exemption. The purpose of 704 as stated at the beginning of the section is 'to prevent motor vehicles within the meaning of the article from escaping taxation and to provide for the more efficient assessment and collection of taxes.' This, in my judgment, simply means that the assessment should be made in order to insure the orderly returning of all property subject to taxation and if the exemption under 2(f) is claimed I must allow it.

"I would appreciate it very much if you would advise me whether or not the exemption referred to above can be allowed on automobiles properly returned for taxation."

Tax exemptions for the blind are provided in Title 51, Section 2, Code of Alabama 1940, as amended by Act No. 639, General Acts 1947, page 491, approved October 9, 1947, which reads, in pertinent part, as follows:

"Persons and property.—The following property and persons shall be exempt from ad valorem taxation and none other: * * * (f) The

property of deaf mutes, insane or blind persons to the extent of three thousand dollars. * * *

By the pertinent provisions of Title 51, Section 1, Code of Alabama 1940, "the term 'property' includes real and personal property."

By the specific provisions of Section 2, *supra*, as amended, the exemption therein provided would extend to the ad valorem taxes on automobiles, properly returned for taxation. Title 51, Section 704, Code of Alabama 1940, as amended by General Acts 1945, page 256, approved July 7, 1945, does not effect the right of a blind person to claim exemption for ad valorem taxes up to \$3,000.00.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 21, 1949.

Hon. Norvelle R. Leigh,
Judge of Probate,
Mobile County,
Mobile 1, Alabama.

Mobile County — Merit System — Employees' Retirement System.

When an employee of Mobile County has been retired under the provisions of the Employees' Retirement System (Act No. 515, General Acts 1945, page 734, as amended by Act No. 606, General Acts 1947, page 445), the Personnel Board of Mobile County is without authority to grant such employee sick leave with pay. Any amount of salary paid to such employee by the Treasurer of Mobile County after the effective date of his retirement must be refunded to the Treasurer of Mobile County.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of February 26, 1949, is as follows:

"Your opinion relative to a question that has arisen as to the Retirement System of this State. The facts in the case are these:

"Mr. George K. Sossaman, for many years a clerk in this office, was retired from service in the fall of 1948, due to his advanced age. His retirement was made effective as of the first of November,

1948, and he received a check early in December from the State Retirement System covering his retirement pay for the entire month of November, 1948. It happens that the Personnel Board of this County had previously approved his remuneration at one-half pay through the ninth of November on the basis of extended sick leave, Mr. Sossaman having been forced to cease active duty some time before, due to ill health. However, Mr. Sossaman received in December from the Treasurer of Mobile County a check representing full pay for the period from November 1 through November 9, 1948, this payment having been approved by all officials charged by law with the duty of making such approval.

"The question has now been raised as to the overlapping payments received by Mr. Sossaman from the County of Mobile and from the State Retirement System as outlined above.

"Will you kindly advise what part of the moneys received by Mr. Sossaman from the County of Mobile and from the State Retirement System for the month of November, 1948, he is liable for as overlapping payments; and express your opinion as to what treasury, department, or official such moneys should be repaid."

When the Board of Control of the Employees' Retirement System acted on Mr. Sossaman's application for retirement as provided by Section 5 of Act No. 515, General Acts 1945, page 734, as amended by Act No. 606, General Acts 1947, page 445, and fixed the effective date of his retirement on November 1, 1948, he ceased to be an employee of Mobile County on such date.

The Personnel Board of Mobile County has authority to grant sick leave to an employee of Mobile County only so long as he is an employee of the county. After November 1, 1948, the effective date of Mr. Sossaman's retirement as fixed by the Board of Control of the Employees' Retirement System, Mr. Sossaman was no longer an employee of Mobile County. Therefore, the Personnel Board of Mobile County was without authority to grant him sick leave with pay after November 1, 1948.

Answering your inquiry, it is my opinion that the payment by the Treasurer of Mobile County to Mr. Sossaman for the period of November 1, 1948 through November 9, 1948, was unauthorized, and that the amount so paid to him should be refunded to the Treasurer of Mobile County.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 21, 1949.

Hon. Henry Jones,
Sheriff, Jackson County,
Scottsboro, Alabama.

Prisoners—Jails—Costs and Fees.

Cost of feeding prisoners confined in county jail for violating the compulsory school attendance law charged against State.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of March 5, 1949, is as follows:

"Please advise the ruling where school parents are locked up in jail for failure to comply with the Compulsory School Attendance Law, and advise as to whether the county or the state should pay for the feeding of these prisoners."

In my opinion, the State should pay for the feeding of the prisoners described in your inquiry.

The law which the prisoners referred to in your inquiry have violated is found in Title 52, Section 303, Code of Alabama 1940. The punishment prescribed is a fine of not more than \$100.00, and in addition thereto the court may impose a sentence of hard labor for not more than ninety days. Trials for the violation of the compulsory school attendance law are conducted in the juvenile court, which has original and exclusive jurisdiction of the offense. Title 52, Section 316, Code of Alabama 1940; *Burrow v. State*, 23 Ala. App. 41, 120 So. 306.

In certain juvenile court cases, the county is required to pay the expenses of feeding prisoners. Title 13, Section 383, Code of Alabama 1940; also Biennial Report of Attorney General, 1934-36, page 178. But when the defendant is an adult charged with violating the compulsory school attendance law, even though the proceedings are in the juvenile court, the fees and compensation, including the feeding of prisoners, is not paid for by the county, but is paid for in the same manner as cases in the circuit court. Quarterly Report of Attorney General, Vol. 22, page 205.

It is my opinion, therefore, that the county is not obligated to feed the prisoners referred to in your inquiry, by reason of the fact that said prisoners were convicted in the juvenile court. It is my opinion that said prisoners are fed as are other prisoners in jail.

The State is required to pay the feed bill for such prisoners under the provisions of Title 45, Sections 144-148, Code of Alabama 1940, as amended by Act No. 309, General Acts 1945, page 502 (which raises the allowance to sixty cents per capita daily). See *Holcombe v. Mobile County*, 229 Ala. 77, 155 So. 640.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

March 21, 1949.

Honorable John B. Tally,
Circuit Solicitor,
Jackson County,
Scottsboro, Alabama.

Grand Juries—Court Reporters—Solicitors.

1. The transcription and preservation of testimony before a grand jury may be accomplished only by the court reporter by direction or order of the circuit judge and as directed by the solicitor or foreman under the provisions of Title 13, Section 262, Code of Alabama 1940.

2. A county governing body is authorized to purchase sound recording equipment for use of the court reporter under the provisions of Title 13, Section 269, Code of Alabama 1940.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of March 9, 1949, is as follows:

"I respectfully request your opinion on the following questions:

"1. Can a machine which records the human voice on a strand of wire, commonly known as a 'wire recorder' be lawfully used in the Grand Jury room for the purpose of perpetuating the testimony of witnesses before that body provided the records made therewith are carefully retained under lock by the solicitor and kept solely for his use?

"If you answer the foregoing question in the affirmative, then this question:

"2. Can the governing bodies of the several counties lawfully purchase such equipment for use with Grand Juries held within their county?"

I am of the opinion that your first inquiry, as framed, should be answered in the negative.

The only provision of law that I am able to find relative to the transcription and preservation of testimony before a grand jury is Title 13, Section 262, Code of Alabama 1940, which provides as follows:

"§ 262. Duties of court reporter.—The official court reporter shall attend in person, except as otherwise herein provided, the sessions of court held in the circuit for which he is appointed, and in every case where directed by the judge or requested by a party thereto, he shall take full stenographic notes of the oral testimony and proceedings, except argument of counsel, and note the order in which all documentary evidence is introduced, all objections of counsel, the rulings of the court thereon, and exceptions taken or reserved thereto. When directed by the said judge he shall attend the investigations of the grand jury and there take such notes of the testimony as directed by the solicitor or foreman. The original stenographic notes of such court reporter in each case or proceeding officially reported shall be preserved by him and treated as a part of the records of the respective courts, and upon his retirement from office, shall be turned over to the clerks of such courts. In equity cases where the testimony is taken orally before the judge, the court reporter, whenever ordered by the judge, shall transcribe his stenographic notes of such oral testimony, and file same in the cause. For such transcript of his stenographic notes the court reporter shall be paid a fee of ten cents for each hundred words thereof, which shall be taxed as a part of the costs in the case." (Emphasis supplied.)

Under the emphasized portion of the above quoted section, the transcript and preservation of the testimony before a grand jury may be accomplished only by the court reporter by direction or order of the circuit judge and as directed by the solicitor or foreman.

In my opinion, sound recording equipment may be used by the court reporter to enable him to more efficiently perform his duties.

In an opinion of this office rendered to the Judge of Probate of Elmore County on January 22, 1948 (Quarterly Report of Attorney General, Volume 50, page 84), it was held that if the county governing body is of the opinion that sound recording equipment is reasonably necessary in order to enable the court reporter to perform his duties efficiently, the county governing body has the discretion to purchase such equipment under the provisions of Title 13, Section 269, Code of Alabama 1940.

From the foregoing, it follows that sound recording equipment before a grand jury may be used only through the medium or agency of the

court reporter and such equipment may be purchased by the county for this in the discretion of its governing body.

The above gives you the information desired in your second inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 21, 1949.

Hon. A. F. Head,
Tax Assessor,
Dale County,
Ozark, Alabama.

Taxation—Escape Assessments—Title 51, Section 276 and Title 51, Section 53, Code of Alabama 1940.

1. The interest in property of a reversioner or remainderman is not affected by delinquent taxes due on and by a life tenant of said property.

2. Tax sale and deed conveys to the purchaser all the right, title and interest of the person or persons whose duty it was to pay the tax, but does not convey the right, title or interest of any reversioner or remainderman.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1949, is as follows:

“Attached to this inquiry you will find a letter addressed to me from Hon. J. A. Huey, Attorney at Law, Enterprise, Alabama. I am also attaching copy of my letter to Mr. Huey informing him of this matter.

“I would like to present the facts in this case as we know them in this office:

“When Clester Brooks presented his deed to this property which he acquired from several Huey heirs, to have it properly assessed, my office immediately began to search for the former owner or tax payer so as to make the proper notation on his assessment sheet. After a diligent search we find this property has escaped taxation much longer than the five years my office is allowed to escape it.

"On page 2, paragraph 3 of his letter to me you will note he refers to a considerable personal property owned by Mr. Acker, and he further states that real estate cannot be sold until all personal property has been exhausted. I find after checking the Acker assessment sheet for the year 1944, his assessment carried 30 dollars value in the personal property column, for the years 1945, 1946, and 1947 this amount was reduced to \$20.00 valuation. The property in question was not on the tax rolls at this time and all taxes assessed to the Ackers was paid and it was not necessary to sell anything for taxes.

"In view of my explanation and my letter to Mr. Huey and Mr. Huey's reply to me, I would appreciate an early ruling from your office on the following questions.

"1. Can an escape assessment be legally set up against this property and if so, for how long a period?

"2. To whom should this escape assessment be made?

"3. If this escape assessment is not paid can it be legally sold for taxation?"

The following additional information from the probate office records was supplied by you upon request from this office in your letter of February 16, 1949:

1. Mrs. Acker owned outright the property that is in question at the time of her death, July 11, 1935.

2. The property in question was willed to Mr. Acker for his lifetime and at his death the property would go to the Hueys.

3. The Huey heirs made Clester Brooks a deed to the property in question on May 26, 1947.

It appears from Mr. Huey's letter that Mr. Acker died in March 1947.

It is my opinion that the only taxes due on the property in question are for the years 1948 and 1949, and these taxes can only and should be assessed in the name of the present owner, Clester Brooks.

It is well settled that the interest of a reversioner or remainderman is not subject to the payment of taxes which were assessed against or were due by a life tenant. Taxes due on real estate by a life tenant die with the life tenant. *Gunter v. Townsend*, 202 Ala. 160, 79 So. 644; Quarterly Report of Attorney General, April 1, 1938.-June 30, 1938, Vol. 11, page 58.

Title 51, Section 276, Code of Alabama 1940 provides as follows:

"§276. Deed delivered to purchaser.—After the expiration of three years from the date of the sale of any real estate for taxes, the judge of probate then in office must execute and deliver to the purchaser, other than the state, or person to whom the certificate of purchase has been assigned, upon the return of the certificate and payment of a fee of one dollar to the judge of probate, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed, including therein, if desired by the purchaser, any number of parcels, or lots purchased by him at such sale; and such deed shall convey to and vest in the grantee all the right, title, interest, and estate of the person whose duty it was to pay the taxes on such real estate, and the lien and claim of the state and county thereto, but it shall not convey the right, title, or interest of any reversioner or remainderman therein."

A full understanding of this statute can be had only by a reference to its legislative history.

In the case of *Dyer v. Branch Bank* (1848) 14 Ala. 622, the court in considering a similar question to that presented here said:

"If the persons in possession in 1845 were liable to pay the tax for that year, their interest only could have been sold to enforce its payment; and if the defendant had a paramount title, dating back to a time previous, its right could not be impaired by the sale. It is clear that a purchaser at a sale under judicial process for the payment of taxes purchases the interest of the party whose property is sold, and not the independent and superior, or ultimate, title of a third person. This seems to us to be a proposition so clear that it need but be mentioned to receive universal concurrence."

However, in *Jones v. Randle* (1880) 68 Ala. 258, the court said:

"Another question was decided by the chancellor, and has been argued before us, namely, the quantum of interest acquired by the purchaser at a sale of real estate for unpaid taxes. In *Dyer v. Branch Bank* (1848) 14 Ala. 622, is a statement by the court (probably a dictum) that, at a sale of lands assessed to a person whose duty it was to pay the taxes for that year, the purchaser acquired only the interest of such person. We do not think this is a proper construction of our present law. On the contrary, we hold that whenever lands are properly sold and conveyed for unpaid taxes imposed on the lands themselves, the purchaser acquires the fee."

So, also, in *Thorington v. Montgomery* (1889) 88 Ala. 548, 7 So. 363, the court said:

"A sale of land for taxes, under our statutes as they then stood, is a sale of the fee, and not of the taxpayer's interest only. It is thus that a failure to pay taxes by a termor, or life tenant, or by

someone for him, may result in the loss of the entire estate. The tax assessed is a charge and lien on the land itself, as well as a legal liability resting on the taxpayer. *Jones v. Randle*, 68 Ala. 258; * * * The statute has been since changed."

Shortly after the decision in *Jones v. Randle* (1880) 68 Ala. 258, supra, the legislature enacted a law reinstating the doctrine of *Dyer v. Branch Bank* (1848) 14 Ala. 622, supra, and expressly providing that the tax sale and deed should convey to the purchaser all the right, title and interest of the person or persons whose duty it was to pay the tax, but not the right, title, or interest of any reversioner or remainderman. Gen. Acts 1884-85, pp. 21, 59, Sections 113, 114. This statute is now Section 276, supra.

And in the case of *Gunter v. Townsend* (1918), supra, a sale and conveyance of land for non-payment of taxes by a life tenant were held to convey only the interest of the life tenant, and not to convey or affect the title of the remainderman. The court said:

"Do not such salutary statutory requirements show that the legislative intent was that the title of a reversioner or remainderman shall not be subjected, by sale at the instance of a municipality to the payment of the property taxes of a life tenant, or those of a limited present estate in the assessed property? Such must be the construction of statutes having application to such sales by municipalities; for, if it can be done, statutes should be so construed as to make it impossible for a man to lose or forfeit his lands 'without ever having had the opportunity of testing by suit the legality of the proceedings by which it is proposed to divest him of his freehold.' *Jones v. Randle* (1880) 68 Ala. 258, 263. If the effect of §1326 of the Code were that contended for, would not such construction, in cases indicated, result in the taking of the real property of reversioners and remainderman by a municipality (under §1319 of the Code, or §110 of the Municipal Act) for the taxes due upon the personal properties of the assessed owner—the life tenant? Such construction, where the taxes on personal properties of the life tenant against whom the assessments were made are sought to be collected from the real property of such 'owner,' who is a remainderman or reversioner, would render the statute offensive to the constitutional provision requiring a uniform property tax (Const. § 217), if, indeed, not offensive to the 'due process' clause of the fundamental law."

Your attention is called to the case of *Downing v. City of Russellville*, 241 Ala. 494, 3 So. (2d), page 34, for an extensive discussion of the questions presented by your inquiry.

In view of the above, the questions presented in your inquiry are specifically answered as follows:

1. Escape assessment may be set up against the property in question only for the taxable years 1948 and 1949.

2. This escape assessment should be made against Clester Brooks who was the owner on October 1, 1947 and on October 1, 1948.

3. If the escape assessment for the taxable year 1948 is not paid by Clester Brooks after proper notice of same, such assessment should be certified to the tax collector for collection as other taxes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 22, 1949.

Hon. J. C. Pattillo,
Clerk, Circuit Court,
Chilton County,
Clanton, Alabama.

Clerks of Circuit Courts — Trial Docket — Checks — Fines —
Arrests.

1. Fine should be paid in money.

2. Payment of fine and costs in criminal case by check is conditional payment, and if check is worthless, there is no payment.

3. Court has inherent authority to make its record speak the truth and amend its trial docket.

4. Defendant having given a worthless check in payment of fine and costs may be rearrested on order of the court, whereupon he must pay fine and costs, confess judgment, or be sentenced.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion under date of March 15, 1949, is as follows:

"I am requesting an opinion in a misdemeanor criminal case where the defendant is fined and he pays the fine and costs with a check, gets a receipt and the Judge writes the case off the docket

and the check proves to be worthless. Can the case be reinstated on the docket and the defendant brought back for re-sentence?"

In my opinion, the defendant should be caused to come before the court and either pay the fine and costs, confess judgment, or be sentenced for fine and costs.

In the first place, the clerk should not accept a check in payment of fine and costs. Fines are required to be paid in money. Title 15, Section 392, Code of Alabama 1940.

Since this was not done, however, the payment of fine and costs by a check of the defendant which turned out to be worthless was merely a conditional payment at the time the check was delivered. When the check was dishonored, the attempted payment was void and there was no payment of fine and costs. *Wadsworth v. State*, 225 Ala. 118, 142 So. 529.

This matter should be brought to the attention of the circuit judge, so that he may, if necessary, issue an order for a writ of arrest to bring the defendant back before the court. Title 15, Section 172, Code of Alabama 1940. At that time, the defendant must either pay his fine and costs, confess judgment, or be sentenced to serve out the amount of fine and costs. Title 15, Section 341, Code of Alabama 1940.

It is further my opinion that the trial docket may be amended to speak the truth if, as a matter of fact, there has been no payment of fine. *Webb v. French*, 225 Ala. 617, 144 So. 818; *Spelce v. State*, 20 Ala. App. 412, 103 So. 694.

In summary, the trial docket should be amended by the judge to show that the fine and costs were not paid. The judge may then order the defendant to be rearrested and brought before him, if necessary, at which time the fine and costs must be paid, judgment confessed, or defendant sentenced.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

March 29, 1949.

Hon. Edgar Underwood,
Judge of Probate,
Franklin County,
Russellville, Alabama.

Hospitals — Counties — Courts of County Commissioners —
Funds.

Act No. 287, General Acts 1945, page 474; Section 215 Constitution of Alabama 1901; Title 22, Sections 192-196, Code of Alabama 1940.

1. The county governing body of Franklin County may appropriate money to participate in the construction of a District Tuberculosis Sanatorium established under the provisions of Act No. 287, General Acts 1945, page 474.

2. Such appropriation may be made from the proceeds of the special levy of two and one-half mills authorized by Section 215, Constitution of Alabama 1901, provided provision has been made for the payment of all prior outstanding obligations against such fund by some method tantamount at law to payment.

3. No part of the proceeds of such special tax may be used for the maintenance or operation of such sanatorium.

4. Any money appropriated by the county for the construction of such sanatorium should be transmitted to the treasurer of the county in which the sanatorium is located.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 17, 1949, is as follows:

"District Number 1 Tuberculosis Sanatorium, situated near Decatur, Alabama, has called upon Franklin County for its pro rata share in the participation for construction of a new building there, in Morgan County.

"There are twelve counties in this district Number 1 and it is our information that each county has agreed to contribute according to its valuation of property assessed for taxation, and Franklin County has, by resolution, agreed to participate. I understand the State and Federal Government will make contributions to the construction of the building, under appropriate Acts of the Legislature and of the Congress.

"(1) Please advise me whether or not the county can legally make this appropriation.

"(2) If so, may the appropriation be paid from the Public Road, Bridge and Building Fund, the 2½ mill tax?

"(3) If so, to whom should the appropriation be paid?

"We do not know whether or not the sanatorium is properly incorporated or organized in compliance with the law, but presume you can obtain this information readily from the State Health Officer."

As I understand the situation outlined by your request, the proposed tuberculosis sanatorium to which you refer therein is one of those district sanatoria whose construction is authorized by the provisions of Act No. 287, General Acts 1945, page 474. This particular act, after arranging the counties of the State in seven designated districts and making provision for the location of a tuberculosis sanatorium in each of such districts, further provides that, if the condition therein be met, the State of Alabama may participate in the cost of constructing and equipping such sanatoria subject to the limitation that such State participation shall not exceed three times that of the regional sponsors nor the amount of \$135,000. It is likewise provided that in the event of Federal participation in such projects, the proportion of State and local participation as above set out shall not be affected. It is, therefore, apparent that in any and all events some degree of local or regional participation is required and necessary and you inquire as to the authority of Franklin County to make its proportionate contribution to the regional fund raised in support of such project.

In my opinion, Franklin County, a county included within the First District, as set up by Act No. 287, *supra*, may make its proportionate contribution to this project. Although Act No. 287, *supra*, makes no mention of the source of those funds raised on the part of the regional sponsors, it is provided within such act that the provisions thereof are cumulative to and should be construed in connection with Article 2, Title 22, Code of Alabama 1940. These latter statutes pertain to the establishment, construction, equipping and operation of county hospitals and sanatoria for tuberculosis, and consist of Sections 191-204, Title 22, Code of Alabama 1940, the amendment to Section 199 thereof not being pertinent to your inquiry.

Turning to the above statutes, it will be found that Section 194 thereof makes provision for the establishment, maintenance and operation of such a sanatorium by two or more adjoining or contiguous counties; Section 195 offers further elaboration upon the establishment and operation of such institution with particular reference to the selection of the Board of Trustees to serve as the governing body of such sanatorium, while Section 196 provides, relative to the appropriations to be made by the counties concerned, as follows:

"The board of revenue, court of county commissioners, or other governing body, of each county, becoming a party to the erection of a joint sanatorium under the provisions of this article may appropriate in the manner set forth in section 192 of this title, in any one year, for establishing and for maintenance purposes a sum not exceeding one mill on each dollar of assessed valuation of each county. Such appropriation shall be a special fund, and shall be transmitted by

the treasurer of the county in which it is collected to the treasurer of the county in which the sanatorium is to be established. All such moneys shall be and remain in a special fund, and be used solely for the purposes for which the appropriation was made: Provided, however, that moneys appropriated for construction purposes, and not needed therefor, may be expended by the board of trustees for maintenance and operation. All moneys expended for purchase of site, construction, equipment, and installation of equipment of any sanatorium shall be paid out by the county treasurer for such fund in charge on the order of the board of trustees of such sanatorium."

Inasmuch as the above statute incorporates therein by reference thereto the pertinent provisions of Section 192, supra, I deem it advisable to here set out the provisions of this latter statute, which are as follows:

"The board of revenue, or court of county commissioners, or other governing body, of any county having jurisdiction, subject to the provisions of section 191 of this title, is hereby authorized and empowered to appropriate from the general funds of the county an amount or amounts sufficient for the purposes of purchasing the site, for construction, equipment and maintenance of a hospital or sanatorium for the treatment of tuberculosis; but, in no case shall the appropriation for the original purchase, construction, equipment and maintenance exceed in any one year an amount equal to one mill of the assessed value of the property in the county where the appropriation is made. If deemed expedient by the governing body making the appropriation for establishing such a hospital or sanatorium contemplated by this article, such appropriation may be continued for three consecutive years but no longer. When the appropriation is made, it shall be set aside yearly as a special fund for the purchase of site, construction and equipment of the sanatorium authorized by the resolution. If project is abandoned, the funds set aside shall be put back in the general fund after the expiration of five years."

In my opinion, the above statutes, which are to be construed in conjunction with Act No. 287, supra, vest in the county governing body the authority to make an appropriation to the District Sanatorium of which you inquire for the purpose of site purchase, construction and equipment, subject to the provision that such appropriation may not in any one year exceed the sum of one mill on each dollar of assessed valuation of the county and subject to the additional restriction that such appropriation can be made for no more than three years. Your first inquiry is, therefore, answered in the affirmative, subject to the conditions above set out.

Your second inquiry, I likewise answer in the affirmative, subject to certain conditions, the first of these being that only that part of such fund may be used as is surplus and above that portion needed toward the payment of principal and interest upon any prior outstanding obliga-

tions against such fund, and then only after provision has been made for the payment of these prior obligations by the establishment of a sinking fund, purchase of securities or some other method tantamount at law to payment. For an exhaustive discussion of the law upon this particular point, I call your attention to an opinion of this office found reported in Quarterly Report of Attorney General, Volume 49, page 104. The second restriction that I would call to your attention relative to the use of such fund is that no part thereof may be used for the maintenance or operation of such sanatorium. Quarterly Report of Attorney General, Volume 49, page 120.

Subject to the above conditions, I know of no objection to the appropriation to which you refer being made from the proceeds of the special tax levied under the provisions of Section 215, Constitution of Alabama 1901. It is true that Title 22, Section 192, *supra*, one of those statutes to which I have referred you as granting to the county authority to make such appropriation, does provide that such appropriation may be made from the general fund of the county. However, I do not consider this restrictive, but rather cumulative to the provisions of Section 215 of the Constitution, above noted. I am, therefore, of the opinion that such appropriation may be made either from the general fund of the county or from the proceeds of the special tax levied under Section 215, *supra*, subject, of course, to the restrictions herein announced.

It might be well, however, to here point out that the provision of Title 22, Section 196, *supra*, to the effect that the surplus of any money appropriated for construction purposes and not needed therefor might be used for maintenance and operation would not be applicable to any money appropriated from proceeds of the special two and one-half mill levy authorized by Section 215, Constitution of Alabama 1901, for the reason that this constitutional provision does not authorize such a use of this money. For this reason, the board of trustees of the sanatorium and the governing body of the county concerned might deem it more wise and expedient for such appropriation to be made from the general fund of the county, this, of course, being a matter addressing itself to the sound discretion of the agencies concerned. However, if it be determined otherwise, the appropriation may be made from the fund to which you refer, subject to the restrictions as to its appropriation and use above set out.

Your third and last inquiry finds answer in the specific provisions of Title 22, Section 196, *supra*, wherein it is stated that:

"* * * Such appropriation shall be a special fund, and shall be transmitted by the treasurer of the county in which it is collected to the treasurer of the county in which the sanatorium is to be established. * * *"

This, I believe, gives answer to your question in this regard.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 29, 1949.

Hon. B. L. Balch,
Superintendent of Education,
Macon County,
Tuskegee, Alabama.

Offices and Officers—Board of Registrars—County Board of
Education—Schools.

Section 280, Constitution of Alabama 1901; Title 41, Section
150, Code of Alabama 1940.

A person employed by the County Board of Education of
Macon County as a teacher may legally serve as a member of
the Board of Registrars of such county, and may receive the per
diem allowed by law for attending the meetings of such Board
of Registrars.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of February 24,
1949, is as follows:

"Mr. W. H. Bentley is employed by the Macon County Board of
Education to serve in the capacity of a teacher of vocational agri-
culture under the veterans' training program. His salary is paid by
the Macon County Board of Education from state funds for which
the state is reimbursed with federal funds. Mr. Bentley has recently
been appointed as county registrar of Macon County for which he
receives per diem for the days he actually serves in that capacity.
I would appreciate it very much if you would give me an opinion
on the two following points:

- (1) Is it legal for Mr. Bentley to serve in both capacities and
draw his pay both from the county as a teacher and his
per diem as registrar?
- (2) If number 1 is answered in the negative, would he be per-
mitted to serve as registrar but accept no pay?"

In answer to your first inquiry, I would advise that in my opinion
there is no constitutional or statutory inhibition against one serving both
as an employee of the County Board of Education, in the capacity of a
teacher, and as a member of the Board of Registrars of the county.

If there be any such prohibition, it is to be found within the pro-
visions of Section 280, Constitution of Alabama 1901, or Title 41, Section

5(7), Code of Alabama 1940, the statutory implementation of such constitutional provision. The provisions of the above are to the effect that, with certain exceptions not pertinent to your inquiry, one may not hold two offices of profit at one and the same time. Although this office has consistently considered membership upon the Board of Registrars to constitute holding an office of profit, it is apparent from your request for opinion that the position the person therein mentioned holds with the County Board of Education of Macon County is in no sense an office but rather a position of employment, and for such reason, I do not consider the provisions of Section 280, *supra*, here applicable, and, in my judgment, a person may legally serve in both capacities at one and the same time.

The above conclusion concerns only the legality of one occupying both positions at one and the same time, and no attempt is herein made to determine the question of whether one might conveniently and adequately perform the duties of each of such positions at the same time. This, for the reason that you have not advised me of the nature of Mr. Bentley's employment, whether full or part time, the hours of employment, etc., and for the further reason that I know of no prohibition against one serving as an employee of the County Board of Education in the capacity of a teacher accepting other and different employment during the time he is not engaged in teaching. Furthermore, there are no prescribed hours during which meetings of the Board of Registrars must be held, and such meetings may be held at such reasonable and convenient hours as are prescribed by the Board. Under these conditions, it is entirely possible that one might be able to serve in both of the capacities herein mentioned at one and the same time, and, in my judgment, any question in this regard addresses itself to the County Board of Education, Mr. Bentley's employer, and Mr. Bentley himself, and if arrangements can be made between these parties I know of no objection to Mr. Bentley's serving upon the Board of Registrars of the county. As regards vacations and leaves of absence for teachers or other employees of the County Board of Education, I call your attention to Title 52, Section 136, Code of Alabama 1940, it appearing from such statute that it is contemplated that such absences be during those times when the schools of the county are not in session.

I am likewise of the opinion that one performing the duties of each of the above-mentioned position is entitled to receive the compensation allowed therefor, in this particular case the salary paid by the County Board of Education and the per diem allowance prescribed for attendance upon meetings of the Board of Registrars. I should mention, however, that receipt of this latter allowance is conditioned upon actual attendance of the meetings of the Board, and one not attending is not entitled to the allowance. Quarterly Report of Attorney General, Volume 51, page 32. Therefore, should Mr. Bentley's duties as a teacher prevent his attending the meetings of the Board of Registrars, he would not be entitled to the per diem allowed by law.

The only authority that might be urged as prohibiting receipt of compensation for the performance of the duties of each of such positions is Title 41, Section 150, Code of Alabama 1940. This office has only recently twice considered this statute and has held it as not applicable to an official court reporter serving as special court reporter for another judicial circuit, nor to an hourly employee of the State Docks and Terminals serving as a member of the Board of Registrars of Mobile County. Quarterly Report of Attorney General, Volume 48, page 126; Quarterly Report of Attorney General, Volume 52, page 55. Neither do I consider the provisions of such statute here applicable for the reason that one serving as a member of the Board of Registrars of Macon County receives no salary for the performance of the duties of such office but rather a per diem allowance conditioned upon actual attendance upon the meetings of such Board. In my judgment, the provisions of Title 41, Section 150, *supra*, were not directed at such an office or employment and have no application here.

In view of the answer given to your first inquiry, it becomes unnecessary for me to consider or give answer to your second.

Yours very truly,

A. A. CARMICHAEL,

Attorney general.

March 29, 1949.

Hon. J. H. Roberts,
Tax Collector,
Russell County,
Phenix City, Alabama.

Tax Collectors—Taxation.

Title 51, Section 219, Code of Alabama 1940, sets forth the procedure for tax collector who has information that any person owing taxes in his county has left the county to levy on any personal property of the taxpayer to be found in the county for the satisfaction of such unpaid taxes.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of February 10, 1949, is as follows:

"Mr. A assessed stock and equipment in the Tax Assessors office of Russell County and said assessment for 1948 tax. During 1948

he moved said stock and equipment out of Russell County, Alabama, into the state of Georgia unknown to the Tax Collector and without paying the tax due.

"Can I, as tax collector of Russell County levy on any auto or other property found in possession of said Mr. A, if found in Russell County, Alabama, and said auto or truck bearing Georgia Auto tag, but owned and operated by the said Mr. A in the same name and style of business as operated in Alabama."

My answer to your inquiry is in the affirmative.

Title 51, Section 219, Code of Alabama 1940, reads as follows:

"§ 219. Levy and sale of personal property when delinquent taxpayer has left county.—When the collector has information that any person owing taxes in his county, whether due or not, has left the county, he shall make out and certify to the judge of probate a bill against such person and procure the approval thereof by the judge of probate in all respects as provided in the second preceding section, and such bill shall operate as a writ of fieri facias, and the same may be executed by the collector if the personal property of the taxpayer be found in his county, or may be by such collector forwarded to the collector of any county in which the taxpayer has any property, and the collector of such other county, on the receipt of such writ, shall file the same for record in the probate office in his county, and without delay shall give notice to the delinquent taxpayer in person or by registered mail, return receipt demanded. On failure of said delinquent taxpayer to satisfy after thirty days from date of such notice, the taxes, fees, and costs due under the writ, in addition to the recording fee and a fee of two dollars for executing such writ, he shall proceed to execute the same as if issued in his county. He shall remit collections thereon to the collector sending him the writ, and is liable under his bond for any neglect of duty under this section."

This code section sets forth the procedure to be followed in levying on any personal property found to belong to Mr. A, either in your county or any other county in the State of Alabama.

The provisions of this section are clear and explicit and I do not think it necessary for me to point out any particular form to be followed by you in proceeding under this section.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 29, 1949.

Hon. H. M. Brittain,
Judge of Probate,
Randolph County,
Wedowee, Alabama.

Filing Tax—Mortgages—Municipalities—Waterworks Board.

Under Title 37, Section 400, Code of Alabama 1940, a mortgage given by the Waterworks Board of Roanoke, Alabama, to the First National Bank of Birmingham is exempt from mortgage filing tax.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of January 19, 1949, is as follows:

"There was filed with me for recording today a mortgage given by the Waterworks Board of Roanoke, Alabama to the First National Bank of Birmingham in the amount of \$160,000.00. There seems to be no doubt that the bank is acting as Trustee and is not the owner of the bonds. Based on the opinion issued to Judge Lee Smith on March 2, 1939 there appears to be no doubt that there should be collected a mortgage tax on the \$160,000.00. The attorney for the bank states that this mortgage is exempt from filing tax and refers me to Title 37, Section 400, Code of Alabama 1940 and to the clause that reads as follows: 'All such bonds and all instruments executed as security therefor shall be exempt from all taxation under the laws of the State of Alabama.'

"Based on the above please give me your opinion as to whether or not the mortgage to the First National Bank of Birmingham is exempt from the filing tax of fifteen cents for each one hundred dollars or fractional part thereof.

"I am holding the mortgage awaiting your opinion as to tax due and would appreciate this opinion at your earliest convenience."

It is my opinion that the mortgage to the First National Bank of Birmingham referred to in your request is exempt from mortgage filing tax.

While you do not so comment in your request for an official opinion, the Waterworks Board of Roanoke, Alabama has apparently been established under Title 37, Sections 394, et seq., Code of Alabama 1940, providing for municipal waterworks boards generally, and the opinion herein set forth is based on this premise.

You will note in Title 37, Section 400, Code of Alabama 1940, in that part dealing with evidences of indebtedness such as bonds, etc. of municipal waterworks boards, that the following provision has been made:

"* * All such bonds and all instruments executed as security therefor shall be exempt from all taxation under the laws of the State of Alabama. * *" (Emphasis supplied.)

The portion of the statute above noted appears to specifically exempt the mortgage you refer to from mortgage filing tax.

The opinion you refer to which was rendered Hon. J. Lee Smith, Judge of Probate of Chilton County, Alabama under date of March 2, 1939 and which holds contra, is not the law today in view of the specific exemption above noted. The referred to opinion, you will note, was released on March 2, 1939 and at such time Act No. 228, General Acts 1936-37, Extra Session, page 274, was the prevailing law, together with Section 368½ of the 1935 Revenue Act (Act No. 194, General Acts 1935, page 256). Act No. 228, supra, related to the then existing functions, duties and authority of municipal waterworks boards, and Section 368½ of the 1935 Revenue Act, in effect, repealed a former exemption of mortgage filing tax by a municipality, said exemption provision having been incorporated in Section 63 of Act No. 478, General Acts 1927, page 534. These laws were the basis on which the opinion to Judge Smith (Quarterly Report of Attorney General, Vol. 14, page 166) was predicated.

However, as noted, the opinion to Judge Smith, supra, was released on March 2, 1939 and you will further note that an amendatory act (Act No. 493, General Acts 1939, page 713) was passed by the Legislature at the 1939 session and became effective on September 22, 1939. Said act revised the functions, duties and authority of municipal waterworks boards generally and specifically included the exemption proviso noted, viz., "* * All such bonds and all instruments executed as security therefor shall be exempt from all taxation under the laws of the State of Alabama. * *" (Emphasis supplied.)

This statutory exemption has been brought forward in our Code and is found at Title 37, Section 400, Code of Alabama 1940, and must therefore be considered the prevailing law today.

In view of the above you are herewith advised that it is my opinion that the mortgage to the First National Bank of Birmingham to which you refer is exempt from the mortgage filing tax for the reasons stated.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 30, 1949.

Hon. C. J. Owens, Senator,
Fifth Senatorial District,
Guntersville, Alabama.

Municipal Corporations—Motor Vehicles.

City of Guntersville has legal authority to fix rates of taxicabs and buses operating within the municipal boundaries.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of February 14, 1949, is as follows:

"This will confirm our telephone conversation of this date in which I asked you for an opinion as to whether or not the City of Guntersville has any legal authority in the setting of charges made by taxicabs and buses."

My answer is in the affirmative.

Constitution of Alabama 1901, Section 220, reads as follows:

"Section 220. No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village."

In *Birmingham Interurban Taxicab Service Corporation v. McLendon*, 210 Ala. 525, 527, 98 So. 578, the Supreme Court of Alabama held, in effect, that the purpose of Section 220, supra, was to vest control of streets in the municipal authorities, they being best informed as to local conditions, and further, that in such manner the conserving of public safety and convenience could best be accomplished.

In the case of *City of Mobile v. Farrell*, 229 Ala. 582, 158 So. 539, the Supreme Court of Alabama held in part as follows:

"* * The right to use the public streets for hire does not exist in public or private enterprises. The privilege is a grant by a sovereign authority, and is what is generally termed a franchise. * * *

"The effect of a legislative franchise is limited by constitutional restrictions, such as contained in sections 22, 220 and 228, Constitu-

tion of 1901. Section 220 was not intended to divest the state of its sovereign power and invest it in cities. But it means that the right of the Legislature to grant a franchise for the use of streets in a city or town for a public utility or private enterprise is subject to the consent of such city or town. Ex parte Ashworth, 204 Ala. 391, 86 So. 84.

"But for the time being, the Legislature has delegated to the cities this right as shown in sections 2016 and 2163, Code. Montgomery v. Orpheum Taxi Co., 203 Ala. 103, 82 So. 117. Cities also have a large degree of police power in respect to the use of its streets, even though the user may have a franchise. Giglio v. Barrett, 207 Ala. 278, 92 So. 668."

It is seen that control of the use of its streets is vested in the municipality and it follows that the municipality may impose reasonable conditions upon those to whom this right of use is extended.

It is also held generally that municipal corporations, under their properly delegated police powers, may prescribe rates for carriage by cab, hack, coach, omnibus, car, or other vehicles used in transportation within the municipal boundaries. 43 C. J., Municipal Corporations, Section 597.

Section 2163 of the 1923 Code referred to in the City of Mobile v. Farrell case, supra, has been brought forward into our 1940 Code at Title 37, Section 750, and reads as follows:

"§750. Drays, carriages, wagons, etc.—Any city or town shall have the power to regulate and license the use of carts, drays, wagons, coaches, omnibuses, and every description of carriages and vehicles kept for hire, and to license and regulate the use of the streets of the town or city by persons who use vehicles or solicit or transact business thereon."

From the authorities above cited, it is my opinion that the City of Guntersville has the legal authority to fix charges made by taxicabs and buses operating within the municipal boundaries as long as said charges are not unreasonable or arbitrary, and your question is therefore answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 30, 1949.

Hon. L. C. Treadway, President,
Board of Plumbers Examination and Registration of Alabama,
Plateau, Alabama.

Officers and Offices—Plumbers—Impeachment.

1. Members of the Board of Plumbers Examination and Registration of Alabama are State officers, who may not be removed at the will of the Governor, under the provisions of Title 55, Section 180, Code of Alabama 1940, but must be impeached.

2. When a member of the Board of Plumbers Examination and Registration of Alabama, appointed to represent journeymen plumbers, does work as a master plumber, he vacates his office.

3. The Board of Plumbers Examination and Registration of Alabama does not have authority to determine who may sit as a member.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of January 3, 1949, is as follows:

"Re: Disputed membership on Board of Plumbers Examination and Registration of Alabama

"In my capacity as president of the Board of Plumbers Examination and Registration of Alabama I request your opinion as to whether George L. Dowling and Lexie Armstrong are members of the board or whether W. C. Smith and L. F. Gober are members. The facts are contained in the correspondence between H. C. Williams as secretary of the board, and the Governor's office. This correspondence is as follows:

"December 2, 1948

"Honorable James E. Folsom, Governor
State of Alabama
Executive Department
Montgomery, Alabama

"Dear Sir:

"I have received copies of your letters dated November 23. One of these is addressed to Mr. George L. Dowling advising him that he is being replaced on the Board of Plumbers Exam-

nation and Registration of Alabama because he has qualified as a master plumber. Another is addressed to Mr. Lexie Armstrong with similar information. The other two letters addressed to Mr. W. C. Smith and Mr. L. F. Gober appointing them to succeed these two gentlemen. These copies were sent to me in my capacity as secretary of the board. For your information, I advise that neither Mr. Dowling nor Mr. Lexie Armstrong is qualified as a master plumber; each of these is licensed by the board as a journeyman plumber, and neither has ever made application for licensing as a master plumber.

"I, of course, do not know where you received the information on which you have acted. However, as stated, neither of these gentlemen is a master plumber, but both are registered as journeymen plumbers.

"In view of these facts, I will appreciate your advising if it is still your intention to remove these men from the board.

"Very truly yours,

"H. C. Williams
Sec.-Treas."

"December 23, 1948

"Honorable James E. Folsom, Governor
State of Alabama
Executive Department
Montgomery, Alabama

"Dear Sir:

"Re: Board of Plumbers Examination and Registration of
Alabama

"As I have not heard from you in answer to my letter of December 2, 1948, and as the men on the old board are still qualified, I assume that you mean for the former board to stand, and I am therefore notifying the members of the old board to be present at the annual meeting in January. If I am in error in my assumption please let me hear from you further.

"Respectfully yours,

"H. C. Williams,
Secretary-Treasurer."

"December 30, 1948

"Mr. H. C. Williams
Secretary-Treasurer
Board of Plumbers Examination
1026 Bell Building
Montgomery 4, Alabama

"Dear Sir:

"Your favors of December 2nd and 23rd, addressed to the Governor, have been referred to me for reply.

"I advised the Governor that if either Mr. George L. Dowling or Mr. Lexie Armstrong were performing duties at any time equaling that of a master plumber, in my opinion, they were then master plumbers. At a hearing held in my office, at which you were present, an admission was made that 25% of their time was taken up in duties under which they would qualify as master plumbers.

"It is to be noted that they are carrying a card of journeyman plumbers but the card is merely prima facie evidence as to their grade as plumbers. So, on my recommendation to the Governor, he appointed their successors in office since they had disqualified themselves under my ruling.

"The Governor also exercised his right under Title 55, Section 180 of the 1940 Code of Alabama, in which it authorized him to remove from office persons with or without cause in any of the state executive departments and agencies.

"In case there is any doubt in your mind as to the Governor's authority to appoint their successors under either of the above cited grounds, we will be glad to submit the matter to the Attorney General for his opinion.

"Yours very truly,

"/s/ Ira B. Thompson
"IRA B. THOMPSON,
Legal Adviser."

"December 31, 1948

"Hon. Ira B. Thompson, Legal Adviser
Executive Office
State Capitol
Montgomery, Alabama

"Dear Sir:

"Thank you for your letter of December 30.

"In accordance with the last paragraph of your letter, I will

very much appreciate your submitting the matter to the Attorney General for his opinion.

"Thanking you and with Best Wishes for the New Year,
I am

"Sincerely yours,

"H. C. Williams

Secretary-Treasurer."

"At the annual meeting which convened at 11 o'clock on Monday, January 3, 1949, George L. Dowling and Lexie Armstrong and W. C. Smith and L. F. Gober all appeared and asked to be seated. The board at my suggestion recessed for a period of two weeks to give time for you to determine which two of these gentlemen are on the board.

"For our guidance in future matters we would also appreciate your advising what action should be taken in case such a dispute arises again. Does the board have authority to determine which of the two persons who claim to be on the board is on the board? If the board is authorized to make such determination, does it mean a majority of the board, or should the president of the board determine the matter? If you determine that the board should settle the question and not the president, then should the old member of the board be allowed to vote?"

In brief, the facts presented by your request are as follows: The Governor of Alabama found that two journeyman plumber members of the Board of Plumbers Examination and Registration of Alabama, George L. Dowling and Lexie Armstrong, had become disqualified to serve on said board as journeyman plumber members thereof, because they devoted twenty-five per cent of their time to the work of "master plumbers," as that term is defined in the pertinent statutory law. These two men are licensed by the board as journeyman plumbers, and have never made application to the board for licenses, or been issued licenses, as master plumbers. To fill the vacancies created by the disqualification of these two members, the Governor, as the appointing authority, appointed two other journeyman plumbers, W. C. Smith and L. F. Gober, as members of the board, and cited as authority for his action Title 55, Section 180, Code of Alabama 1940.

Your request presents the following questions:

1. Does the Governor have the right to remove a member of the Board of Plumbers Examination and Registration of Alabama under the authority given him by Title 55, Section 180, Code of Alabama 1940?

2. Does a journeyman plumber member of the Board vacate his office if he does work as a master plumber?

3. Does the Board have authority to determine which two of the four persons, who claim to be on the Board, are on the Board?

4. If the Board is authorized to make such a determination, does it act through a majority of the Board, or should the President of the Board determine the matter?

5. If the Board determines the matter, then are the old members of the Board allowed to vote?

The Board of Plumbers Examination and Registration of Alabama is created and governed by Title 62, Sections 115-128, Code of Alabama 1940, but there is no provision made therein for the removal of a member. Sections 116 and 117, *supra*, are respectively, as follows:

"There shall be a board to be known as a board of plumbers examination and registration of Alabama. Said board shall consist of nine members who shall be appointed by the governor of Alabama. Four of said members shall be master plumbers as defined by this subdivision; four shall be journeyman plumbers as defined by this subdivision; and one shall be a duly qualified health officer of Alabama or of some political subdivision thereof, or of a sanitary or civil engineer engaged in the public health work in Alabama. There shall be a list submitted to the governor containing the names of eight licensed master plumbers, eight journeyman plumbers and a list of two health officers or sanitary or civil engineers submitted by the state board of health and the governor shall appoint the members of the board from said lists."

"Each member of the board of plumbers examination and registration of Alabama shall serve for a term of four years and until his successor is duly appointed and qualified except as hereinafter specified. An unexpired term of any member of said board caused by death, resignation or otherwise shall be filled by appointment of the governor of Alabama. Of the first appointee hereunder two journeyman plumber and two master plumber shall be appointed for a term of two years, two journeyman plumber and two master plumber for a term of three years and the remaining member for a term of four years."

In the absence of any provision for removal in Sections 115-128, *supra*, it is necessary, in order to answer the first question, to determine whether or not the members of the Board of Plumbers are State officers within the meaning of Title 41, Section 178, Code of Alabama 1940, which reads, in pertinent part, as follows:

"The following officers may be impeached and removed from office, to-wit: * * * * and all other state officers not named in section 173 of the constitution, * * * *"

If they are officers within the meaning of Section 178, *supra*, then they can only be removed in the manner provided therein; but, if they are not such officers, then they may be removed by the Governor at will, under the provisions of Title 55, Section 180, Code of Alabama 1940, which provides as follows:

"The governor is authorized and empowered to remove from office and discharge from employment, with or without cause, any person who holds office or employment in any of the state executive departments and agencies by virtue of appointment by the incumbent governor or any preceding governor, except those employees subject to the merit system provisions."

A careful review of the authorities leads me to the conclusion that the members of the Board of Plumbers are officers within the meaning of Title 41, Section 178, *supra*, and, as such, are subject to removal only by impeachment.

In *State ex rel. Ciyatt v. Hocker*, 39 Fla. 477, 22 So. 721, the Florida Supreme Court had occasion to decide this question in an analogous situation, when it determined that the members of the Board of Legal Examiners of Florida were state officers. The duties and powers of the Florida Board, in its field, almost exactly parallel the duties and powers of the board in the instant case. In discussing the problem, the Florida Supreme Court said that the term "office" implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; a public office being an agency for the state, and the person whose duty it is to perform the agency being a public officer. The term embraces the idea of tenure, duration, and duties, and has respect to a public trust to be exercised in behalf of government, and not merely transient, occasional, or incidental employment. A person in the service of the government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature, and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and the duties remaining though the incumbent dies or is changed, is a public officer; every "office," in the constitutional meaning of the term, implying an authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws. A state officer is one who falls within this definition. Said the Florida court:

"Applying these tests to the statute under consideration, we are clearly satisfied, and without any semblance of doubt, that the board of legal examiners created thereby, as the medium through whom the privilege of practicing law is to be conferred upon the citizen, are such officers * * * *"

See, also, *State ex rel. State Board of Medical Examiners, et al. v. Clausen* (Wash.), 146 Pac. 630, where members of the state board of medical

examiners were held to be officers; *Adie v. Mayor of Holyoke* (Mass.), 21 N. E. 2d 377, where members of a municipal gas and electric commission were held to be officers; *State ex rel. Haas v. Stone*, 240 Ala. 677, 200 So. 756, where it was held that members of the county board of revenue, review, and equalization were officers; Quarterly Report of Attorney General, Vol. 3, page 186, where members of the board of dental examiners were held to be officers; and Quarterly Report of Attorney General, Vol. 23, page 173, where members of the county board of public welfare were held to be officers.

In the last cited opinion (Quarterly Report of Attorney General, Vol. 23, page 173), as in the instant case, no provision was made for the removal of a member who had been appointed for a definite term. The law was therein summarized as follows:

"The statute, although it fixes a specific term, contains no provision for the removal of the Board member. It is, therefore, necessary to resort to the case law to determine the authority vested with the power to remove these members.

"The general rule is that where no definite term of office is fixed by law the power to remove an incumbent is an incident to the power to appoint, in the absence of some constitutional or statutory provision to the contrary. *Touart v. State*, 173 Ala. 453, 56 So. 211; *Jefferson County v. O'Gara* (Ala. App.), 195 So. 267, 272 c. d. 239 Ala. 3, 195 So. 277. See, also, 22 R. C. L. 562, Section 266, n. 3; 46 C. J. 985, Section 146 n. 76.

"But where a fixed term is assigned to the office, the appointing authority has no absolute power of removal. *Throop on Public Officers*, 353, Section 354, n. 2; *Mechem On Public Officers*, 284, Section 445, n. 2, 3; also page 287, Section 454, n. 3.

"Many authorities are collected in *Adie v. Mayor of Holyoke*, 21 N. E. 2d. 377, 380 (Mass.), supporting the rule that the right of removal does not exist in the appointing power, in the absence of some constitutional or statutory provision, where the term of the official is fixed by law for a definite period. See, also, 46 C. J. 985, Section 146, n. 78; 22 R. C. L. 562, Section 266, n. 6.

"From what has been said, it may be stated that since the statute has provided the member of the Board with a fixed term of office she may be removed only in the manner provided by statute for her removal therefrom.

"It cannot be questioned that a member of the County Board of Public Welfare is a public officer, since, without doubt, such member is 'executing an agency of the State under the authority of a public law.' *Jefferson County v. O'Gara*, supra; *Jeffers v. Wharton*, 197 So. 352. * * * *

I, therefore, conclude that the answer to the first question is in the negative, since a member may only be removed by impeachment.

The second question was partially answered in an opinion of this office now appearing in Quarterly Report of Attorney General, Vol. 51, page 34, wherein it was held that when a member of the Board of Plumbers Examination and Registration of Alabama, appointed to represent journeyman plumbers, becomes licensed as a master plumber, he vacates his office on said board.

We now must determine if the doing of the work of a master plumber by a journeyman plumber member of the Board, who is not a licensed master plumber, also vacates his office.

Section 119, *supra*, defines master plumbers and journeyman plumbers as follows:

"* * * * A 'journeyman plumber' within the meaning and for the purpose of this subdivision shall be held to mean and to include any person other than a master plumber, who, as his principal occupation, is learned in the actual, practical, physical installation of plumbing as a handicraft or trade. A 'master plumber' within the meaning and for the purposes of this subdivision shall be held to mean and to include any person, firm or corporation engaged in or proposing to engage in the business of contracting to do or superintending the installation of plumbing, either or both; but if such applicant for registration be an individual, he must either qualify himself to be a licensed master plumber or must continually keep in his active employ a duly registered and licensed master plumber; and if such licensee be a firm or corporation, at least one active member of such firm or corporation must be a duly registered master plumber, actively continuously connected with the conduct of said business."

Section 116, *supra*, in setting up the Board of Plumbers, provides, in pertinent part, as follows:

"* * * * Four of said members shall be master plumbers as defined by this subdivision; four shall be journeyman plumbers as defined by this subdivision; and one shall be a duly qualified health officer of Alabama or of some political subdivision thereof, or of a sanitary or civil engineer engaged in the public health work in Alabama. * * * *"

In the light of the language used in Section 116, *supra*, to the effect that the board members shall be master plumbers and journeyman plumbers "as defined in this subdivision," I conclude that if any of the journeyman plumber members of the Board are actually doing the work of a master plumber, then they are, in fact, master plumbers as defined in

Section 119, *supra*, regardless of whether or not they are licensed as master plumbers.

Having thus passed into another classification incompatible with their position on the board, such members would be no longer qualified to serve as members of the board in the capacity of journeyman plumbers, and they, thereby, vacate their offices. Quarterly Report of Attorney General, Vol. 51, page 34.

The fact that the candidate may have been qualified at the time of his election is not sufficient to entitle him to hold office, if at the time of the commencement of the term or during the continuance of the incumbency, he ceases to be qualified. 42 Am. Jur. 912.

In *State ex rel. Coe v. Harrison*, 217 Ala. 80, 114 So. 905, the appellee was eligible to the office of city councilman at the time of his election, but after his induction into office he ceased to be qualified by reason of his failure to pay poll taxes imposed upon him by statute. The court, construing the statute, which in substance provided that a councilman should be a qualified elector within the territory from which he should have been elected, as meaning that after his election the councilman should continue to be a qualified elector during his term of office, overruled the appellee's contention that the statute governed eligibility to office only, and not qualification to continue to hold office after election and induction into office according to law. It was, therefore, held that the appellee vacated the office of councilman when, during the term for which he was elected, he failed, within the time allowed by law, to pay the poll tax due the state, which was a prerequisite to being a qualified elector.

It was held in *State ex rel. Fugina v. Pierce*, 191 Wis. 1, 209 N. W. 693, that under a statute providing that no person shall be eligible to the office of judge who, at the time of his election or appointment, is not an attorney of a court of record, the qualification provided for is a continuing one, and must subsist during the entire term of office, although the statute in terms provides that it shall exist at the time of election or appointment; and that, therefore, an attorney who was elected a judge, but whose certificate of admission to the bar of the court of Wisconsin was revoked during his term of office, was disqualified to hold that office. The court said: "This is so plainly a personal and continuing qualification of one entitled to be an incumbent of the office that a reasonable interpretation of the statute requires the conclusion that the existence of such qualification cannot be limited merely to the time of election or appointment, but must subsist at the time of taking office and during the continuation of such occupancy."

I, therefore, answer the second question in the affirmative.

In answer to the third question, as to whether the Board has the authority to determine who is a member thereof, you are referred to the answer to the first question, wherein it was pointed out that mem-

bers can only be removed from office by impeachment, and to the answer to the second question, wherein it was stated that a member vacates his office by failure to remain qualified therefor.

It is the Board's business to pass on the qualifications of all plumbers within its jurisdiction, regardless of whether or not they are board members. "A public officer, as we have already said, accepts his office with all of the burdens which the law imposes upon the incumbent of that office. He knows when he accepts the office what its perquisites are, and he must, with diligence, perform all of the duties of the office * * * *"

Mobile County v. Williams, 180 Ala. 639, 657-658, 61 So. 963.

In that respect, you are referred to Section 125, supra, which reads, in pertinent part, as follows:

"The board, on its own initiative or upon written complaint lodged with the board and signed by the person making such complaint may make investigation and conduct hearing with reference to any violations of any of the provisions of this subdivision. If the board finds as a result of such hearing that the holder of a license has obtained same through error or fraud, is incompetent or has willfully violated any of the provisions of this subdivision, the board shall forthwith revoke said license; * * * *"

If the Board should determine by the processes outlined by statute, supra, that one of its members is in violation of the law, in that he is a journeyman plumber doing the work of a master plumber, without a license as a master plumber, the Board could revoke his license as a journeyman plumber, its action being subject to review in the courts. Then, the Board would be safe in assuming that the member had vacated his office and in seating his successor appointed by the Governor. However, you are advised that the Board's determination in this respect is by no means final. Regardless of any action of the Board, should an old member of the Board decline to relinquish his office to one purporting to have been appointed as his successor, then resort must be had to the courts to determine who has the legal right and title to the office.

In carrying out the provisions of Section 125, supra, the Board is merely enforcing the law against an individual and is not determining who shall sit as a member even though the decision might incidentally have that effect. The Board does not have the power to remove one of its members. Such removal can be effected only as outlined in the answers to the first and second questions. I, therefore, answer the third question in the negative.

The answer to the third question makes it unnecessary to answer the fourth and fifth questions.

I deem it advisable, also, to call your attention to Sections 127 and 128, *supra*, which read, respectively, as follows:

"It shall be unlawful for any person to do or perform, or to contract, direct or superintend any plumbing done within any incorporated town, village, city in any such county in the State of Alabama unless regularly licensed so to do as provided by this subdivision."

"Any person who shall engage in the business of master plumber, or in the trade of journeyman plumber for compensation valuable consideration or reward in any such county without first obtaining the license required by this subdivision, or who shall violate any other provision of this subdivision, or who shall knowingly and willfully make any false statement to the board concerning his application to or his examination by the board, with intent to deceive shall be guilty of misdemeanor, and in addition to the revocation of his license by the board, shall be fined not less than ten dollars, and not more than five hundred dollars for each offense, and each days violation shall constitute a separate offense."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 30, 1949.

Hon. Herman K. Longshore,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

License Taxes—Veteran's Exemption.

Under the provisions of Act No. 353, General Acts 1945, page 570, and as amended by Act No. 698, General Acts 1947, page 535, the \$15.00 exemption provided for in section 2 of Act 698, *supra*, would apply generally to all qualified veterans of World War II, whether they are members of a partnership or not, where their property, real or personal, is valued at \$7,000 or more or whose annual net income is \$3,000 or more.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of January 25, 1949, is as follows:

"A question has arisen as to whether or not Section 864(6) of Title 51 of the Code of Alabama limits an individual who is not a part of a corporation, association or partnership to an exemption of \$15.00 in the event his real and personal property is valued at \$7,000.00 or more or whose net annual income is \$3,000.00 or more. I will appreciate your answer as to whether or not this is true."

Section 6 of Act No. 353, General Acts 1945, page 570, is as follows:

"No exemption under the provisions of this act shall be allowed any corporation or association. As to partnerships, the exemption shall be allowed a partnership only when each partner thereof individually would be entitled to an exemption hereunder. However, an individual entitled to an exemption shall not be denied it by reason of being a member of a partnership in those cases when the licenses are required of the individual members of a partnership and not of the partnership as such. Any such veteran whose property, both real and personal, is valued at \$5,000.00 or more or whose net annual income is \$2,500.00 or more shall not be granted the exemptions provided for herein."

Section 2 of Act 698, General Acts 1947, page 535, amends Section 6 of the 1945 Act, and appears to liberalize the exemption provided for, and is quoted as follows:

"Section 6 of Act 353, approved July 6, 1945, which relates to exemption of veterans from business and occupational licenses, is amended to read: 'Section 6. No exemption under the provisions of this Act shall be allowed any corporation or association. As to partnerships, the exemption shall be allowed a partnership only when each partner thereof individually would be entitled to an exemption hereunder. However, an individual entitled to an exemption shall not be denied it by reason of being a member of a partnership in those cases when the licenses are required of the individual members of a partnership and not of the partnership as such. Provided, however, that any veteran whose property, both real and personal, is valued at \$7,000.00 or more or whose net annual income is \$3,000.00 or more shall not be granted the exemption provided herein but shall be granted an exemption of \$15.00 on his licenses from each the City, County and State.'"

While Section 2 of Act No. 698, General Acts 1947 applies mainly to veterans who are members of a partnership, it would appear from an examination of that Act and Act No. 353, General Acts 1945 as a whole that it was the intent of the legislature that the \$15.00 exemption contained in the proviso in the last sentence of Section 2 of the 1947 Act is to apply generally to all qualified veterans, regardless of whether they are members of a partnership or not, whose property, real and personal, is valued at \$7,000 or more or whose annual net income is \$3,000 or more. Your question, therefore, is answered accordingly.

This conclusion is fully supported by a previous opinion of this office in which it was held that the limitation contained in the last sentence of Section 6 of the 1945 Act (before amendment) which provided that "Any such veteran whose property, both real and personal, is valued at \$5,000 or more or whose net annual income is \$2,500 or more shall not be granted the exemption provided for herein," applies generally to all veterans coming within the provisions of said Act. Quarterly Report of the Attorney General, Vol. 40, page 50. Also see Quarterly Report of the Attorney General, Vol. 50, page 202, and opinion of the Attorney General to Hon. Lecil Gray, Judge of Probate, Walker County, Alabama, dated December 6, 1948.

Your further attention is called to the fact that under the same statutes no exemption whatsoever is accorded to a corporation or an association.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 31, 1949.

Hon. Frank A. Reagan,
Judge of Probate Court,
Etowah County,
Gadsden, Alabama.

Filing tax—Deeds—Mortgages.

1. Payment of purported mortgage filing tax by an exempt bank does not constitute effective payment of a mortgage filing tax under Title 51, Section 619, Code of Alabama 1940, so as to qualify said instrument for exemption from deed tax (Title 51, Section 618, Code of Alabama 1940) and ad valorem tax (Title 51, Section 619 (f), Code of Alabama (1940).

2. Where mortgagor conveys his interest in the mortgaged property to a vendee who assumes the mortgage debt, the unpaid balance of the mortgage debt should be included in determining "value" in order to compute the amount of the deed tax.

3. Where the mortgagor conveys his interest in the mortgaged property to a vendee who does not assume the mortgage debt, the unpaid balance of the mortgage debt is not includible in determining "value" in order to compute the amount of the deed tax.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion bearing date of February 5, 1949, is as follows:

"Several problems in connection with the collection of mortgage tax and/or transfer tax on a deed tax scale have arisen in this office in recent weeks, and, in most instances, involve mortgages which are now owned by governmental agencies or are in the process of being transferred to governmental agencies.

"In the form of a brief statement of facts, and queries, I submit to you the following, viz:

"1. A national bank is exempted from paying the mortgage tax at the time of filing the original mortgage for record. If, at the time the bank takes the mortgage, it has full knowledge that it will be transferred in the course of business to a non-exempt agency, as for example, a life insurance company, can the bank be permitted to waive its exempted category and pay the full mortgage tax at the time of filing the mortgage for record, or must the mortgage be filed without the payment of mortgage tax, and the transfer tax, on a deed scale, paid with each succeeding transfer of the mortgage?

"2. Again, the national bank is exempt from paying the mortgage tax, and files a mortgage for record without paying such tax. It is transferred by the bank to another federal agency, as for example, the Reconstruction Finance Corporation. No tax is due on this assignment. However, subsequent to the execution of the mortgage, the original mortgagor executes a deed of conveyance for his equity in the real estate described in the mortgage, and the vendee of said original mortgagor expressly assumes and agrees to pay the indebtedness secured by the mortgage and in accordance with the terms thereof. It has been my understanding that deed tax, in such an instance, is due on the cash consideration involved in said deed, if any, and since no mortgage tax has been paid on the mortgage, that deed tax is also collected on the unpaid balance of the mortgage outstanding at the time the deed is executed and delivered. In other words, in such a case, deed tax is collected on the full consideration for the deed as though it were an out and out cash consideration. In turn, the vendee in the first deed sells to a subsequent purchaser, again, the purchaser assuming and agreeing to pay the indebtedness secured by the mortgage. Should I again collect deed tax on the unpaid balance of the mortgage, or is it collectible only in the first instance recited above?

"3. Under the same set of facts, as outlined in paragraph 2 above with respect to the original execution, filing, and the transfer

of the mortgage, the original mortgagor undertakes to sell and convey his equity in the property subject to the outstanding unpaid balance on the mortgage, there being no specific assumption on the part of the mortgagor's vendee. In this case, would deed tax be due only on the cash changing hands, or would deed tax be due on the total amount involved in the consideration which includes the unpaid balance of the mortgage? Again, on succeeding transfers of the same property, and with reference to the same mortgage debt, would deed tax be due on the entire amount or just the cash increment changing hands?

"4. The mortgage is executed to a national bank filed for record with no mortgage tax being paid, and is still owned by said national bank. Would the answer to paragraphs 2 and 3 above be any different because a transfer of the mortgage had not intervened?

"A large volume of instruments is being presented for recording in this county and which involve the above considerations in one form or another. I would appreciate, therefore, an early expression of opinion from you with respect to these matters in order that I may insure that the proper fees are collected by this office for the benefit of the State of Alabama."

I shall attempt to answer your questions concerning the collection of mortgage taxes and transfer taxes in the order in which you have presented them. It is to be assumed throughout that none of the taxes discussed are collectible where a federal instrumentality is involved.

I.

The answer to your first question is that a national bank may not pay a mortgage tax at the time of filing the original mortgage, and thereby insure that transfer taxes upon the filing of future deeds of conveyance will not have to be paid. I should like to call your attention to General Acts of 1947, page 66, (Title 51, Section 619 (1), 1947 Cumulative Pocket Part, Code of Alabama 1940):

"No tax as levied by the State in the recording of mortgages of whatever kind filed for record in the probate court in any county in the State shall be levied upon or collected from any bank in this State unless the said tax shall be applicable to and collected from all banks and banking institutions doing business in the State of Alabama."

It is clear that no tax is either levied or collectible against a bank for the recording of mortgages. Clearly, then, a bank may not pay a tax which does not exist. Such a voluntary payment, in the amount of a mortgage filing tax which would be ordinarily collectible against an individual,

would at best be a gift. Such a payment would definitely not constitute a payment of a mortgage filing tax itself.

Title 51, Section 618, Code of Alabama 1940, which places a tax upon the recording of deeds which convey any interest in property, exempts deeds which transfer mortgages "upon which the mortgage tax has been paid" When the bank purported to pay a mortgage filing tax which was, in fact, not levied or collectible against that bank, a mortgage tax within the meaning of Section 618, *supra*, has not been paid. Similarly, Title 51, Section 619 (f), Code of Alabama 1940, states: "There shall be no ad valorem tax collected on any such instrument, or the debt secured thereby which shall have paid the tax prescribed by this section, either state, county or municipal." Again if a bank purported to pay the mortgage filing tax prescribed by Section 619, *supra*, it would not, in fact, be paying a tax prescribed by that section, and an "ad valorem" tax would still be collectible. It is settled law that a statute which creates an exemption from taxation must be strictly construed. *Brown v. Protective Life Insurance Company*, 188 Ala. 166, 66 So. 47.

II.

A deed tax must be collected on the unpaid balance of the mortgage, upon which a mortgage filing tax has not been paid, each time the mortgagor's interest in the mortgaged property is transferred. Title 51, Section 618, Code of Alabama 1940 states that "No deed, bill of sale, or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, . . . shall be received for record unless the following privilege

or license tax shall have been paid upon such instrument before the same is offered for record" This section taxes the recording of all instruments purporting to convey property or interest in property. The amount of the tax is determined in each instance according to the value of the property or property interest which is being conveyed. The key word here is "value." Clearly, consideration is strong evidence in the determination of value. See Quarterly Report of Attorney General, Volume 17, page 265; Cf. Quarterly Report of Attorney General, Volume 19, page 181. When the mortgagor's interest is conveyed, and the vendee assumes the mortgage, the unpaid balance of the mortgage is part of the consideration passing from the vendee to the vendor. Therefore, unless the mortgage filing tax has previously been effectively paid, this unpaid balance must be considered in the determination of "value."

III.

Again "value" is the key word. Where the vendee does not assume the mortgage, he has not undertaken to pay off the debt, or the unpaid balance of the debt as the case may be, which is secured by the mortgage. Thus, the amount of the debt cannot be considered as part of the

consideration flowing from the vendee to the mortgagor. If we take consideration as being good evidence of value, only the cash consideration changing hands should be included in the determination of "value." I do not agree with you that the unpaid balance of the debt is included in the consideration.

The reasoning in the above paragraph would apply equally to each succeeding transfer of the mortgagor's interest in the mortgaged property.

IV.

I see no reason why the answer to this question would be any different from my answer to Questions II and III above.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

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